TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 850

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, ET AL., PETITIONERS,

vs.

CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1947.

CERTIORARI GRANTED FEBRUARY 10, 1947.

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation, Plaintiffs-Appellants,

against

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, Waddill Catchings, John Foster Dulles, Walter E. Sachs, Henry S. Bowers, Clinton M. Fluney, James F. Fogarty, Herbert C. Freeman, John B. Niven, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, William C. Bechert, Jacob P. Friedman, Albert E. Pardee, Ralph Jonas, Louis E. Kilmarx, Christian A. Johnson, David G. McCornack, John H. Eccles, Clarence F. Dillon, Otto A. Philipp and Hugh B. Baker, Defendants-Appellees

STATEMENT UNDER RULE 13

This suit was commenced on the 5th day of July 1945, by the filing of a complaint and the issuance of a summons by the clerk of the District Court.

The following, named as defendants in the complaint, have not been served with process: Arthur Sachs, Frank L. Taylor, Constantine A. H. Narlian, Charles Ward Schroeder, Reuben E. Glass, Walter C. Ross, George Touche, Andrew W. Tait, Charles R. Whitworth, Harold A. Anderson, Robert Sealy and North American Securities Corporation.

As to the following persons and corporations named as defendant in the complaint return of process has been vacated and the complaint dismissed: R. Gilman Smith, [fol. 2] Howard J. Sachs, New Empire Corporation, Electric Investment Corporation, Federal Utilities, Inc., Utilities Securities Corporation and Onandaga Corporation.

On October 1 and October 5, 1945 motions were made to dismiss the complaint for lack of subject matter jurisdiction. On May 20, 1946 an order granting the motions was

entered. On May 22nd, 1946, a final judgment and decree was made and entered dismissing the complaint for want of jurisdiction of the subject matter. The notice of appeal was filed on the 19th day of June 1946.

Plaintiffs appear by Austrian & Lance.

Defendants Harrison Williams, Clifford F. Stone, Clinton M. Finney and Albert E. Pardee, appear by Sullivan & Cromwell and Milton Pollack.

Defendants Walter E. Sachs, Henry S. Bowers, Sidney J. Weinberg, John Foster Dulles and Waddill Catchings, appear by Sullivan & Cromwell.

Defendants James F. Fogarty and Herbert C. Freeman appear by LeBoeuf & Lamb.

Defendants John B. Niven, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, William C. Bechert and Jacob P. Friedman, appear by Hawkins, Delafield & Longfellow.

Defendant Clarence F. Dillon appears by Cahill, Gordon, Zachry & Reindel. Defendant Dillon did not join in the motions made against the complaint.

Defendants Ralph Jonas, Louis E. Kilmarx, Christian A. Johnson, David A. McCornack, John H. Eccles, Otto A. Philipp and Hugh B. Baker appeared in person, did not join in the motions made, and were not in default at the time of the entry of the judgment below.

Other than as described above, there has been no change of parties or attorneys since the commencement of this action.

[fol. 3] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation, Plaintiffs,

against

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, Waddill Catchings, John Foster Dulles, Arthur Sachs, Walter E. Sachs, Howard J. Sachs, Henry S. Bowers, Ralph Jonas, Frank L. Taylor, Clinton M. Finney, James F. Fogarty, Herbert C. Freeman, Louis E. Kilmarx, Constantine A. H. Narlian, Charles Ward Schroeder, Reuben E. Glass, Walter C. Ross, George Touche, John B. Niven, Andrew W. Tait, Charles R. Whitworth, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, William C. Bechert, Jacob P. Friedman, Christian A. Johnson, David G. McCornack, R. Gilman Smith, John H. Eccles, Harold A. Andersen, Clarence F. Dillon, Robert Sealy, Otto A. Philipp, Albert E. Pardee, Hugh B. Baker, North American Securities Corporation, New Empire Corporation, Electric Investment Corporation, Federal Utilities Inc., Utilities Securities Corporation and Onondaga Corporation, Defendants

AMENDED COMPLAINT

Plaintiffs, Carl J. Austrian and Robert G. Butcher, as Trustees of Central States Electric Corporation, by their attorneys Austrian & Lance, file this bill of complaint against the defendants above-named and thereupon plaintiffs state and allege that:

A-1. Central States Electric Corporation, (hereinafter referred to as the "Debtor"), was and still is a corporation [fol. 4] organized and existing under the laws of the State of Virginia, and, until and after the filing of the petition for reorganization, as hereinafter more particularly set forth, had its principal office in the City of Richmond, State of Virginia, and maintained an office for the transaction of business in the Borough of Manhattan, City, County and State of New York.

A-2. On February 23, 1942, said Debtor filed its petition for reorganization under and pursuant to the provisions of

Chapter X of the Act of Congress relating to Bankruptcy, in the District Court (hereinafter referred to as the "District Court") of the United States for the Eastern District of Virginia.

A-3. On the 27th day of February, 1942, the District Court, by order duly made and entered the same day, approved said petition.

A-4. Thereafter and on the 15th day of November, 1944, Carl J. Austrian, and on the 20th day of March, 1945, Robert G. Butcher, were duly appointed the Trustees of the said Debtor and were expressly vested by the said District Court in the respective orders of appointment with all the additional rights and powers which Receivers in Equity would have if appointed by a Court of the United States for the property of the Debtor.

A-5. Plaintiffs have duly qualified as Trustees of the Debtor by entering into bonds with the United States, as required by law.

A-6. At all the dates and times subsequent to the dates mentioned in paragraph "A-4" hereinabove, plaintiffs have been and still are acting as the duly appointed and qualified Trustees of said Debtor.

[fol. 5] A-7. Upon the appointment and qualifications of plaintiffs as Trustees, as aforesaid, they became and still are vested for the benefit of said Debtor, the creditors and stockholders thereof, in accordance with the provisions of the laws of the United States in such cases made and provided with all and singular the property, estate, assets and causes of action which were owned by said Debtor or to which said Debtor or its creditors were in any wise entitled on the day when said petition for reorganization was filed, as aforesaid.

A-8. Heretofore and by order made and entered by the District Court, plaintiffs were granted leave, permission and authority to institute and prosecute this suit.

A-9. Plaintiffs invoke the jurisdiction of this Court and bring this action under the authority of the Constitution of the United States, (Article I, Section 8, Clause 4, and Article III, Section 2), the Act of Congress relating to Bankruptcies (U. S. Code, Title 11), and pursuant to the

provisions of Section 24 (1), (19) of the Judicial Code [U. S. Code, Title 28, Section 41 (1), (19)].

A-10. The amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

A-11. At all of the times hereinafter mentioned, the sole and only voting rights of the stockholders of the Debtor were vested exclusively in its 7% preferred stock and in its common stock, each share of the above-described preferred and common stock of the Debtor having one vote.

A-12. Each of the defendants enumerated in Schedules "A", "B" and "C" occupied the positions of trust and responsibility in and with respect to the Debtor during the times and periods set opposite his name upon said Sched- [fol. 6] ules. Whenever reference will be made throughout this complaint to any of the defendants enumerated in Schedules "A", "B" and "C" and in paragraphs "A-13", "A-14", "A-15", "B-2" and "B-8" of this complaint, such reference will be to his surname.

A-13. During the year 1929 and subsequent to the organization of Shenandoah Corporation, more particularly described in paragraph "A-26" of this complaint, the following-named defendants occupied the following offices and positions of trust and responsibility in and with respect to said Shenandoah Corporation, to wit:

Harrison Williams	—Director
Clifford F. Stone	—Director and President
Sidney J. Weinberg	—Director
Waddill Catchings	—Director
John Foster Dulles	—Director

A-14. On and after the 3rd day of July, 1929, and during the remainder of the year 1929, the following-named defendants occupied the following positions of trust and responsibility in and with respect to Goldman Sachs Trading Corporation, a corporation organized under and pursuant to the laws of the State of Delaware, to wit:

Waddill Catchings	—Director and President
Sidney J. Weinberg	—Director
Arthur Sachs	—Director
Walter E. Sachs	—Director
Howard J. Sachs	—Director

Henry S. Bowers —Director
Ralph Jonas —Director
Frank L. Taylor – Director

A-15. On and subsequent to the third day of July, 1929, and at all the times mentioned herein subsequent thereto during the year 1929, defendants Waddill Catchings, Sidney J. Weinberg, Arthur Sachs, Walter E. Sachs, Howard [fol. 7] J. Sachs and Henry S. Bowers were copartners doing business in the City and State of New York, under the firm name and style of Goldman Sachs & Co., (hereinafter referred to as "Goldman Sachs & Co.").

Upon Information and Belief

A-16. At all of the times hereinafter mentioned and subsequent to the year 1912, Williams owned and controlled in his own name, or in the name or names of a nominee or nominees, or in the name or names of a corporation or corporations all the stock of which corporation or corporations was owned either directly or indirectly by said Williams, the shares of the common stock of the Debtor in the number and percentages of the total issued and outstanding common stock of the Debtor, as set forth in the following schedule, to wit:

COMMON STOCK

Date	No. of Shares Outstanding	Owned and Controlled by Harrison Williams	%
Dec. 31, 1912	44,816	12,341	27.5
" " 1913	54,519	17,622	32.3
" " 1914	54,519	11,138	20.4
" " 1921	54,519	13,976	25.6
" " 1922	54,519	34,833	63.9
" " 1923	54,519	43,166	79.2
" " 1924	109,038	104,671	96.0
" " 1926	1,090,380	1,053,435	96.0
" " 1927	1,090,380	1,055,985	96.0
" " 1928	1,177,503	1,142,810	97.1
" 6, 1929	8,723,368	5,388,427	61.8
" 31, 1930	9,623,860	5,119,990	53.2
" " 1931	10,125,422	5,182,133	51.2
" " 1936	10,114,148	5,123,961	50.6
June 30, 1941	10,105,023	5,115,861	50.6

The number of shares owned and controlled by Williams on February 23, 1942, did not vary in any substantial degree from the number of shares owned and controlled by him on June 30, 1941. The number of shares owned and [fol. 8] controlled by Williams did not vary in any substantial degree between the respective dates set forth above other than the variance disclosed in the above schedule.

A-17. At all of the times hereinafter mentioned and subsequent to the year 1912, Williams owned and controlled in his own name, or in the name or names of a nominee or nominees, or in the name or names of a corporation or corporations all the stock of which corporation or corporations was owned either directly or indirectly by said Williams the shares of the 7% preferred stock of the Debtor in the number and percentage of the total issued and outstanding 7% preferred stock of the Debtor as set forth in the following schedule, to wit:

Date	Shares Outstanding	Owned by Williams	%
December 31, 1912	37,347	647	1.7
" " 1913	45,433	6465	14.2
" " 1914	45,433	6429	14.2
" " 1921	45,433	7349	16.1
" " 1922	45,433	6164	13.6
" " 1923	45,433	6349	14.0
" " 1924	45,433	0	0

The number of shares owned and controlled by Williams did not vary in any substantial degree between the respective dates set forth above other than the variance disclosed in the above schedule.

A-18. By reason of said ownership and control of the common stock of the Debtor, as more particularly alleged in paragraph "A-16" of this complaint, Williams completely dominated and controlled the assets, business, policies and affairs of the Debtor, and by reason of said domination and control, caused to be elected as directors and as officers of the Debtor only such persons as would be subservient to his will and would carry out his wishes with respect to the [fol. 9] Debtor's assets, policies, business and affairs.

A. 19. By reason of the foregoing facts Williams was subject to and in fact assumed all of the duties, liabilities and responsibilities of a fiduciary of and for the Debtor.

A-20. Beginning as early as the year 1922 Williams conceived of a plan and conspiracy the single and entire purpose of which was to use his fiduciary position as the dominant and managing stockholder of the Debtor for his own personal profit and for his own personal and selfish purposes to draw large amounts in cash from the Debtor by way of dividends, to make and enjoy secret profits, to acquire interests and assets to the detriment of the Debtor and in complete disregard of the interests and welfare of said Debtor and Williams' fiduciary duties to the Debtor. In the course of the execution of said plan, Williams:

(a) Acted at and throughout the dates and periods mentioned hereinafter as the self assumed agent of the Debtor although he was neither an officer nor a director of the Debtor;

(b) At and during said dates and periods and entirely in his own interest acted as the manager of the Debtor, dictated its policies and controlled its affairs in complete disregard of the corporate personality of the Debtor;

(c) Arranged to achieve all the purposes herein set forth by depriving the Debtor of any independent will of its own and of any voice in its own affairs by means of a management contract whereby, through New Empire Corporation one of his wholly owned corporate creatures, he supplied the Debtor with officers, directors [fol. 10] and employees whose sole fealty and loyalty was in fact to him and not to the Debtor;

(d) Through this management contract he took possession of the Debtor's assets and affairs and engaged in a continuing conspiracy with persons hereinafter named to loot, defraud, overreach and mismanage the Debtor;

(e) In the course of this plan and conspiracy, he engaged in many specific transactions and ventures, all corrupt and deviously concealed from the Debtor's rightful owners, creditors and stockholders, and to that end, and in the course thereof, he:

I. Appropriated to himself for his own personal profit contracts, opportunities and assets belonging to the Debtor;

II. Used the funds of the Debtor for his own individual benefit and caused the Debtor to assume ventures and investments made by him individually which had become onerous and burdensome to him;

III. Overreached the Debtor and made unconscionable and unreasonable profits at its expense;

IV. Disregarded the corporate existence of the Debtor and at numerous times and occasions so acted that he was in fact dealing with himself, while trying to maintain an outward appearance that the Debtor was an independent entity with a will of its own;

V. Used the funds of the Debtor to engage in ventures solely and entirely in his individual and personal interest and resulting in great losses to the Debtor;

[fol. 11] VI. In his capacity as fiduciary, manager and dominant stockholder, caused the Debtor to embark on a course of conduct designed to destroy assets of the Debtor and to enable him to evade and avoid his just obligations to the Debtor;

VII. Concealed the existence of his wrongdoings until the same were discovered after the filing of the petition for reorganization, as above set forth.

(f) All of the transactions hereinafter set forth were simply steps in the effectuation by Williams of his continued and continuing plan and conspiracy to loot, defraud and overreach the Debtor, the particulars of which are hereinafter set forth.

A-20-A. Williams and the other defendants named in this action knowingly, deliberately, intentionally and fraudulently concealed and kept concealed from the Debtor and plaintiffs as Trustees all of the facts with respect to the transactions described in this complaint. Neither the Debtor nor plaintiffs as Trustees obtained or had any knowledge or information of the said matters, frauds and wrongdoings, or any of them, alleged and set forth herein, until after the completion of an investigation of the acts, conduct, property, liabilities and financial condition of the Debtor directed to be made by order of the District Court, dated November 15, 1944, pursuant to the provisions of Section 167 of the Bankruptcy Act. Said investigation was commenced after November 15, 1944. Thereafter, and subse-

quent to November 15, 1944 and within two years of the commencement of this action, the said frauds, wrongs and transactions complained of herein were for the first time discovered by plaintiffs as Trustees and came to their attention and knowledge.

[fol. 12] A-21. During all the times hereinafter mentioned, Williams owned directly or indirectly all the capital stock of defendants North American Securities Corporation (hereinafter referred to as "Nasco"), New Empire Corporation (hereinafter referred to as "New Empire"), Onondaga Corporation (hereinafter referred to as "Onondaga"), Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation.

A-22. Beginning with the month of March, 1929, and thereafter during 1929, Nasco was indebted to the Debtor in the amounts and on the dates set forth in the following schedule, to wit:—

Date	Amount
March 31	$ 355,000
April 30	1,465,000
May 31	1,512,000
June 30	2,222,000
July 31	2,837,000
August 31	3,487,000
September 30	5,492,000
October 31	10,477,000
November 30	7,322,100.52
December 31	492,100.52

A-23. In and around the month of July, 1929, Debtor was in great need of ready cash as evidenced by the following:

(a) The Debtor was indebted to banks during the dates and in the amounts specified in the following schedule, to wit:—

Date	Amount
June 30	$ 1,500,000
July 31	9,750,000
August 31	14,000,000
September 30	14,000,000
October 31	14,000,000
November 30	14,000,000
December 31	8,000,000

[fol. 13] (b) On or about the 11th day of June, 1929, the Debtor sold 115,500 shares of its own preferred stock, 6% optional dividend series of 1929, for $11,241,000;

(c) During the month of July, 1929, there were outstanding as obligations of the Debtor in excess of $19,000,000 of 5% debenture bonds, issued in 1928;

(d) On September 15, 1929, Debtor issued additional debentures in the face amount of $25,000,000.

A-24. At all of the times hereinafter mentioned Goldman Sachs & Co. controlled and dominated Goldman Sachs Trading Corporation in that the six partners of Goldman Sachs & Co. were directors of Goldman Sachs Trading Corporation and constituted 75% of the board of directors of Goldman Sachs Trading Corporation.

A-25. In or about the month of July, 1929, Williams and Catchings conceived the idea of forming a corporation for the purpose of owning common stocks in various and sundry public utility and industrial corporations.

A-26. Accordingly and during the month of July, 1929, Williams acting for and on behalf of the Debtor, and Catchings acting for and on behalf of Goldman Sachs Trading Corporation, caused to be organized Shenandoah Corporation (hereinafter referred to as "Shenandoah") under and pursuant to the laws of the State of Delaware.

A-27. Williams acted as the agent of the Debtor in connection with the organization of Shenandoah.

A-28. Goldman Sachs & Co. acted as the bankers in connection with the organization of Shenandoah.

[fol. 14] A-29. The Debtor and Goldman Sachs Trading Corporation acted as the joint sponsors in connection with the organization of Shenandoah.

A-30. After Shenandoah was organized, Williams as agent for the Debtor, and Catchings as agent for the bankers, Goldman Sachs & Co., and Goldman Sachs Trading Corporation, orally agreed that the Debtor would sell to Shenandoah 480,770 shares of the Debtor's own common stock at a price then and there determined and agreed upon

by and between Williams and Catchings to be in the amount of $52. per share.

A-31. No one but Williams participated in these negotiations with Catchings on behalf of or as agent for the Debtor.

A-32. On the day Williams and Catchings made their oral agreement, as set forth in paragraph "A-30" of this complaint, on the 24th day of July, 1929, during the entire period of the organization and financing of Shenandoah and at the time of the performance of said agreement, the Debtor pursuant to the laws of the State of Virginia and in accordance with the terms and provisions of the Debtor's charter, had an authorized common stock of 10,000,000 shares in number, all without par value, of which 8,283,660.39 shares were issued and outstanding.

A-33. At the time this oral agreement and arrangement as set forth in paragraph "A-30" of this complaint was made between Williams and Catchings the Debtor had the complete authority, right and power under and pursuant to the laws of the State of Virginia and under and pursuant to its own charter to sell, deliver and transfer to Shenandoah as originally issued 480,770 shares of its own common stock at a price of $52. per share.

[fol. 15] A-34. At the time that they participated in the organization of Shenandoah and in the formation of the oral agreement above described in paragraph "A-30" of this complaint, Williams and Catchings knew that the Debtor was fully able to sell and deliver to Shenandoah the Debtor's own common stock as originally issued shares to the extent of 480,770 shares.

A-35. At the time that they participated in the organization of Shenandoah and in the formation of the oral agreement above described in paragraph "A-30" of this complaint Williams and Catchings knew or should have known that the Debtor owned as treasury stock only 536.5 shares of its own common stock.

A-36. Then and there and prior to the execution of the written agreement more particularly set forth and described in paragraph "A-38" of this complaint, Williams determined that he would prevent the Debtor from selling to Shenandoah the entire block of 480,770 shares of its own common stock and that for his own individual use and

benefit he would deprive the Debtor of the full benefit of the said contract more particularly described hereinafter in paragraph "A-38" of this complaint, to the extent of 20% thereof, namely 96,154 shares.

A-37. At the time Williams came to this decision he alone was acting as the Debtor's agent in connection with the making of the agreement for the financing of Shenandoah and he alone was acting as the Debtor's agent in connection with and with respect to the sale to Shenandoah of 480,770 shares of the Debtor's own common stock; accordingly, and by reason of these facts, Williams was a fiduciary of and for the Debtor in connection with the said contract of sale.

[fol. 16] A-38. Thereafter and on the 23rd day of July, 1929, the oral agreement made by and between Williams and Catchings with respect to the financing of Shenandoah and the sale to Shenandoah by the Debtor of 480,770 shares of the Debtor's own common stock was reduced to a written contract to which the Debtor, Goldman Sachs Trading Corporation, Shenandoah and Goldman Sachs & Co. were parties. A copy of this agreement is annexed hereto marked Exhibit "A(1)" and made a part hereof.

A-39. Pursuant to that agreement, Exhibit "A(1)" annexed hereto, Debtor agreed to sell and Shenandoah agreed to buy 480,770 shares of the Debtor's common stock at a price computed and agreed to be $52: per share.

A-40. Williams was familiar with and was fully cognizant of the rights of the Debtor as embodied in said contract with Shenandoah, Exhibit "A(1)" annexed hereto.

A-41. By reason of the facts set forth hereinabove it was the duty of Williams to further the interests of the Debtor and to refrain from interfering with its contract right to sell 480,770 shares of its own common stock to Shenandoah.

A-42. At a time when the Debtor was entitled by contract to $5,000,000 on the delivery by it of 96,154 shares of its own common stock to Shenandoah pursuant to the agreement, Exhibit "A(1)" annexed hereto, which contract the Debtor was fully able to perform, Williams, the Debtor's dominant and managing stockholder and fiduciary, caused the Debtor against its own interest to purchase 96,154 shares of its own already issued common stock from

Nasco for delivery to Shenandoah pursuant to the above mentioned contract, Exhibit "A(1)" annexed hereto. Said conduct and action by Williams was corrupt, fraudulent and illegal and resulted in a loss to the Debtor of $5,000,000.

[fol. 17] A-43. Despite Williams' duty as a fiduciary of the Debtor not to impair the interest of the Debtor arising out of the said contract Exhibit "A(1)" annexed hereto, and the Debtor's right to sell 480,770 shares of its own unissued common stock to Shenandoah for $52. per share, and in violation of his fiduciary obligations, Williams, Fogarty, Freeman, Kilmarx, Narlian, Schroeder, Stone, Glass and Ross, conspired together and agreed and formed the deliberate design and purpose to misappropriate the benefits of said contract to the extent of 96,154 shares amounting in price to the sum of $5,000,000, to the gain and advantage of Williams.

A-44. The diver's acts and things done by Williams, Fogarty, Freeman, Kilmarx, Narlian, Schroeder, Stone, Glass and Ross, as hereinabove alleged and as more particularly set forth hereinafter, were all steps in this design and conspiracy in which all of the persons named in this paragraph participated, and which were all done for the common purpose of depriving Debtor of the benefits of said contract with Shenandoah, Exhibit "A(1)" annexed hereto, and to enable Williams to sell the already issued shares of the Debtor's common stock owned by Nasco rather than to permit Debtor to sell its own unissued shares as was its right under and pursuant to the above mentioned contract with Shenandoah, Exhibit "A(1)" annexed hereto.

A-45. Debtor would have been able to realize the sum of $5,000,000 from the sale of 96,154 shares of its own unissued common stock to Shenandoah, included within the 480,770 shares specified in the contract Exhibit "A(1)" annexed hereto, but for the fraudulent acts of Williams in overreaching the Debtor, in abusing the trust and confidence of the Debtor, in taking advantage of the Debtor, and in causing the 96,154 shares of the Debtor's outstanding com-
[fol. 18] mon stock owned by Nasco to be sold to said Shenandoah in the place and stead of the Debtor's own unissued common stock, pursuant to the plan, scheme and conspiracy more particularly elaborated and set forth herein.

A-46. Debtor could and would have performed the contract made by it as aforesaid with Shenandoah, Exhibit "A(1)" annexed hereto, and the obligations on its part to be performed according to the terms of said contract to the Debtor's great gain and profit, but for the violations of fiduciary obligations, duties and trusts and the wrongful acts and conduct of Williams, Fogarty, Freeman, Kilmarx, Narlian, Schroeder, Stone, Glass and Ross, as hereinabove and hereinafter set forth.

A-47. Williams, Fogarty, Freeman, Kilmarx, Narlian, Schroeder, Stone, Glass and Ross, well knowing the facts and transactions hereinbefore set forth, and the rights and obligations of the Debtor and the parties in and to the premises, planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor, and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, debenture holders and creditors, they would so proceed as to enable Williams wrongfully to appropriate to Williams' own use and benefit and to enable Williams to take, receive, acquire and retain for himself and for his own benefit said contract made as aforesaid by Debtor with Shenandoah, Exhibit "A(1)" annexed hereto, to the extent of 96,154 shares of its own unissued common stock and any and all rights and benefits accruing or which might accrue to Debtor under said contract of sale, and to appropriate and retain to Williams through Nasco, his wholly owned corporate instrumentality, the benefits of [fol. 19] said contract of sale and to exclude the Debtor therefrom without any consideration therefor; and the persons above named in this paragraph, in violation of their fiduciary obligations, duties and trusts then and there secretly entered into a corrupt and unlawful agreement and conspiracy with each other to do and cause to be done the aforesaid unlawful acts and things and to accomplish and cause to be accomplished the aforesaid corrupt, fraudulent and illegal objects and purposes, and Catchings, Weinberg, Arthur Sachs, Walter E. Sachs, Howard J. Sachs, Bowers, Jonas, Taylor and Dulles became parties to and acted in said plan, agreement and conspiracy, as in this complaint set forth, and the acts and things herein complained of were done by the persons named in this paragraph in aid and

in execution of said plan, agreement and conspiracy and said corrupt, fraudulent and illegal objects and purposes.

A-48. In order to induce Catchings, Weinberg, Arthur Sachs, Walter E. Sachs, Howard J. Sachs, Bowers, Jonas and Taylor to assist him in the fraudulent, corrupt and illegal conspiracy hereinabove and hereinafter set forth, Williams promised and agreed with said persons above named in this paragraph to cause the Debtor:

(a) To purchase 30,000 shares of the common stock of Goldman Sachs Trading Corporation from Goldman Sachs Trading Corporation at a price of approximately $3,300,000;

(b) To permit Goldman Sachs & Co. to act as the bankers in and with respect to the organization and financing of Shenandoah, and thus enable Goldman Sachs & Co. to receive $1,500,000 as underwriting and bankers' commissions, and Catchings, Weinberg, Arthur Sachs, Walter E. Sachs, Howard J. Sachs, Bowers, Jonas and Taylor, promised and agreed with Williams that if the foregoing matters were accom- [fol. 20] plished they would aid and abet Williams in his fraudulent, corrupt and illegal conspiracy, and would interpose no objections to his causing Nasco to sell 96,154 shares of the already issued common stock of the Debtor to Shenandoah in the place and stead of the Debtor selling its own unissued common stock to the extent of 96,154 shares, and Catchings, Weinberg, Arthur Sachs, Walter E. Sachs, Howard J. Sachs, Bowers, Jonas and Taylor, did in fact aid, abet and assist Williams in the formation and execution of said corrupt, fraudulent and illegal plan, agreement and conspiracy, and said Williams did in fact cause Debtor to purchase 30,000 shares of the common stock of Goldman Sachs Trading Corporation from Goldman Sachs Trading Corporation at a price of approximately $3,300,000, and did in fact permit Goldman Sachs & Co. to act as the bankers in the organization and financing of Shenandoah, for which said Goldman Sachs & Co. received as bankers' and underwriting commissions the said sum of $1,500,000.

A-49. Pursuant to said plan and corrupt, fraudulent, and illegal agreement and conspiracy, Williams did in fact

fraudulently and illegally procure Fogarty, Freeman, Kilmarx, Narlian, Schroeder, Stone and Ross, in violation of their duties, trusts and obligations to the Debtor, to agree on behalf of the Debtor with Nasco, to pay to Nasco the sum of $5,000,000 in consideration of the delivery by Nasco to Shenandoah of 96,154 shares of the already issued common stock of the Debtor, and to exclude the Debtor from its contract right as fixed in Exhibit "A(1)" annexed hereto to sell and deliver its own unissued common stock to Shenandoah to the extent of 96,154 shares for the sum of $5,000,000, and the persons named in this paragraph did in fact corruptly, fraudulently and illegally appropriate [fol. 21] the benefits of said contract between Debtor and Shenandoah, Exhibit "A(1)" annexed hereto, to the use of Williams and for Williams' sole benefiit through Nasco, the corporate creature of Williams, and did in fact permit Williams to take as his own and to receive for his own individual benefit the fruits of said contract, Exhibit "A(1)" annexed hereto.

A-50. The Debtor received no valuable consideration nor anything of value whatsoever and none of the persons named as participating in this transaction paid to the Debtor any consideration at all for said appropriation by Williams of the Debtor's said property and contract right to sell and deliver 96,154 shares of its own unissued common stock to Shenandoah for the sum of $5,000,000 as provided in the agreement Exhibit "A(1)" annexed hereto.

A-51. Catchings, Weinberg, Arthur Sachs, Walter E. Sachs, Howard J. Sachs, Bowers, Jonas, Taylor and Dulles co-operated with Williams herein and assisted him in the execution as aforesaid and as hereinafter set forth of his said plan and corrupt, fraudulent and unlawful agreement and conspiracy and became parties thereto and to the carrying out thereof in violation of their duties and obligations to the Debtor, and in complete subservience to the wishes and decisions of Williams, and the persons above named in this paragraph acted as aforesaid with full and complete knowledge of or being on notice of and upon inquiry as to all the facts herein set forth, the rights and obligations of the parties in and to the premises and the wrongful character of the transactions to which they were parties.

A-52. Pursuant to and in execution of said plan and corrupt, fraudulent and illegal agreement and conspiracy and for the accomplishment thereof Fogarty, Freeman, [fol. 22] Kilmarx, Narlian, Schroeder, Stone, Glass, Ross and Williams, did and caused to be done and assisted in the doing of the acts and things hereinbefore and hereinafter complained of including, among others, the following, to wit:

(a) On or about the 24th day of July, 1929, they caused the Debtor to make an agreement with Nasco to pay to Nasco the sum of $5,000,000 for delivery to Shenandoah of 96,154 shares of the already issued and outstanding common stock of the Debtor; a copy of said agreement is annexed hereto and marked Exhibit "A(2)" and made a part hereof;

(b) On the 24th day of July, 1929, at a meeting of the board of directors of the Debtor, at which were present the following directors, to wit: Fogarty, Freeman, Kilmarx, Narlian, Schroeder, Stone, and the following officer, namely, Ross, they caused proceedings to be taken whereby the said contract with Nasco was ratified and approved;

(c) Thereafter and pursuant to said fraudulent, corrupt and illegal agreement, and on the 5th day of August, 1929, Nasco did deliver 96,154 shares of the already issued common stock of the Debtor to Shenandoah and was paid therefor the sum of $5,000,000 by the Debtor on the 7th day of August, 1929;

(d) They refrained and caused the Debtor to refrain from delivering 96,154 shares of its own unissued common stock to Shenandoah and receiving $5,000,000 therefor, as the Debtor had the right under and pursuant to said contract with Shenandoah, Exhibit "A(1)" annexed hereto;

[fol. 23] (e) They refrained and caused the Debtor to refrain from making appropriate and authorized use of the Debtor's unissued common stock then and there existing and available for delivery to Shenandoah under the said contract with Shenandoah, Exhibit "A(1)" annexed hereto;

(f) They made no effort whatsoever and caused the Debtor to refrain from making any effort whatsoever

to fulfill the terms of said contract with Shenandoah by delivering to Shenandoah 96,154 shares of Debtor's own unissued common stock for the sole benefit of the Debtor;

(g) They used their positions of trust and responsibility and the powers vested in them by the Debtor to prevent the Debtor from making any delivery of its own unissued, authorized common stock to Shenandoah to the extent of 96,154 shares;

(h) They misused the powers entrusted to them by the Debtor and made corrupt, fraudulent and illegal use of their said powers for the purpose of corruptly enriching Williams, all in violation of their fiduciary duties, obligations and trusts as officers, directors and fiduciaries of and for the Debtor;

(i) They used their positions of trust and responsibility and the powers vested in them by the Debtor for Williams' own profit and to deprive the Debtor of property and contract rights lawfully belonging to the Debtor and to deprive the Debtor of profits to which the Debtor alone was lawfully entitled by causing Nasco to make the delivery to Shenandoah of 96,154 shares of the already issued and outstanding common stock of the Debtor owned by Nasco for $5,000,000 in the [fol. 24] place and stead of the Debtor delivering 96,154 shares of its own unissued common stock pursuant to said contract with Shenandoah for $5,000,000;

(j) From the 20th day of July, 1929, to the 7th day of August, 1929, they caused the Debtor to purchase from Goldman Sachs Trading Corporation 30,000 shares of the common stock of the Goldman Sachs Trading Corporation for approximately $3,360,000;

(k) They permitted Goldman Sachs & Co. to act as the bankers for Shenandoah in connection with the financing and organization of Shenandoah to the profit of Goldman Sachs & Co., of $1,500,000.

A-53. Pursuant to and in execution of said corrupt, fraudulent and illegal plan, agreement and conspiracy and for the accomplishment thereof, Catchings, Weinberg, Arthur Sachs, Walter E. Sachs, Howard J. Sachs, Bowers,

Jonas and Taylor, with full knowledge that Williams was acting in his own personal interest and not for the benefit of the Debtor, assisted Williams in the doing of all the acts and things hereinbefore and hereinafter complained of including among others the following, to wit:

(a) On the 23rd day of July, 1929, they caused Goldman Sachs Trading Corporation to execute the agreement, Exhibit "A(1)" annexed hereto, with the intent and for the purpose of permitting Williams to obtain 20% of the benefit of said contract by selling for his own individual benefit 96,154 shares of the already issued and outstanding common stock of the Debtor to Shenandoah for $5,000,000 in place and stead of the Debtor selling the same number of shares of its own unissued common stock for $5,000,000;

[fol. 25] (b) They made no effort to interfere with Williams' corrupt, fraudulent and illegal plan and conspiracy to deprive the Debtor of the full benefit of said contract with Shenandoah, Exhibit "A(1)" annexed hereto;

(c) They actively assisted Williams in selling through his corporate creature Nasco for his own individual benefit 96,154 shares of the already issued and outstanding common stock of the Debtor to Shenandoah for $5,000,000 in the place and stead of the Debtor selling its own unissued common stock to Shenandoah in the same number for $5,000,000, pursuant to the terms and provisions of the agreement with Shenandoah, Exhibit "A(1)" annexed hereto.

A-54. Pursuant to and in execution of said corrupt, fraudulent and illegal plan, agreement and conspiracy and for the accomplishment thereof, Catchings, Weinberg, Stone, Williams and Dulles, with full knowledge that Williams was acting in his own personal interest and not for the benefit of the Debtor, assisted Williams in the doing of the acts and things hereinbefore and hereinafter complained of including among others the following, to wit:

(a) On the 23rd day of July, 1929, they caused Shenandoah to execute the agreement Exhibit "A(1)" annexed hereto, with the intent and for the purpose of permitting Williams through his corporate creature,

Nasco, to obtain 20% of the benefit of said contract by selling for his own individual benefit 96,154 shares of the already issued and outstanding common stock of the Debtor to Shenandoah for $5,000,000 in place and stead of the Debtor's selling the same number of shares of its own unissued common stock for $5,000,000;

[fol. 26] (b) They caused Shenandoah to receive 96,154 shares of the already issued comon stock of the Debtor purportedly pursuant to the agreement, Exhibit "A(1)" annexed hereto, when in fact they knew or should have known or were put on inquiry of facts which should have caused them to believe and to know that said 96,154 shares were delivered to Shenandoah in the interests of and on behalf of Williams;

(c) They made no effort to interfere with Williams' corrupt, fraudulent and illegal plan and conspiracy to deprive the Debtor of the full benefit of said contract with Shenandoah, Exhibit "A(1)" annexed hereto;

(d) They refrained and caused Shenandoah to refrain from insisting that the entire 480,770 shares of the common stock of the Debtor to be delivered pursuant to the agreement, Exhibit "A(1)" annexed hereto, be of original issue contrary to their duties and obligations as directors of Shenandoah;

(e) They used their positions of trust and responsibility and the powers vested in them by Shenandoah for Williams' own profit and to deprive the Debtor of property and rights lawfully belonging to the Debtor and of benefits to which the Debtor alone was lawfully entitled by accepting from Williams 96,154 shares of the Debtor's already issued common stock for the sum of $5,000,000;

(f) Knowing that Williams was violating his fiduciary obligations to Debtor, they nevertheless participated in said violations and assisted Williams in carrying out his unlawful plan, corrupt agreement and conspiracy by permitting Williams through his corporate [fol. 27] creature Nasco to sell to Shenandoah his own stock of the Debtor to the extent of 96,154 shares;

(g) They knew that the purported sale to Shenandoah of said 96,154 shares by Williams through his

creature Nasco was a sham, a fraud and a device whereby Williams accomplished his corrupt plan and unlawful conspiracy to deprive the Debtor of the benefits of said agreement, Exhibit "A(1)" annexed hereto, to the extent of $5,000,000 thereof;

(h) They actively assisted Williams in selling through his creature Nasco for his own individual benefit 96,154 shares of the already issued and outstanding common stock of the Debtor to Shenandoah for $5,000,000 in the place and stead of the Debtor selling its own unissued common stock to Shenandoah in the same amount for $5,000,000 pursuant to the terms and provisions of this agreement with Shenandoah, Exhibit "A(1)" annexed hereto.

A-55. Pursuant to and in execution of said corrupt, fraudulent and illegal plan, agreement and conspiracy and for the accomplishment thereof, Catchings, Weinberg, Arthur Sachs, Walter E. Sachs, Howard J. Sachs and Bowers, as copartners doing business under the firm name and style of Goldman Sachs & Co., with full knowledge that Williams was acting in his own personal interest and not for the benefit of the Debtor, assisted Williams in the doing of the acts and things hereinbefore and hereinafter complained of including among others the following, to wit:

(a) On the 23rd day of July, 1929, said defendants doing business under the firm name and style of Goldman Sachs & Co. executed the agreement, Exhibit [fol. 28] "A(1)" annexed hereto, with the intent and for the purpose of permitting Williams to obtain 20% of the benefit of said contract by selling through his creature Nasco for his own individual benefit 96,154 shares of the already issued and outstanding common stock of the Debtor to Shenandoah for $5,000,000 in place and stead of the Debtor selling the same number of its own unissued common stock for $5,000,000;

(b) They made no effort to interfere with Williams' corrupt, fraudulent and illegal plan and and conspiracy to deprive the Debtor of the full benefit of said contract with Shenandoah, Exhibit "A(1)" annexed hereto;

(c) They actively assisted Williams in selling through his creature Nasco for his own individual

benefit 96,154 shares of the already issued and outstanding common stock of the Debtor to Shenandoah for $5,000,000 in the place and stead of Debtor selling its own unissued common stock to Shenandoah in the same number for $5,000,000 pursuant to the terms and provisions of this agreement with Shenandoah, Exhibit "A(1)" annexed hereto.

A-56. Williams took and received the said $5,000,000 obtained by Nasco for the delivery of the aforementioned 96,154 shares of the already issued common stock of the Debtor and held, and now holds the said $5,000,000 and all the profits derived therefrom in trust as the property of the Debtor herein and of plaintiffs as Trustees of said Debtor.

A-57. By reason of the premises each of the defendants named as participating in this transaction has become and is now liable to account to the Debtor and to plaintiffs as [fol. 29] Trustees thereof as aforesaid for the $5,000,000 received by Williams or Nasco for the delivery of 96,154 shares of the already issued common stock of the Debtor by Nasco to Shenandoah as aforesaid.

A-58. By reason of the foregoing Williams has made large and substantial profits, the exact amount of which are unknown to plaintiffs. Williams has invested and reinvested the said $5,000,000 and by reason thereof has made and earned additional large and substantial profits, the exact amounts of which are unknown to plaintiffs at the present time.

A-59. No part of the said $5,000,000 for which each of the persons named as participating in this transaction are accountable and liable as aforesaid has ever been paid or returned to said Debtor or to plaintiffs as Trustees thereof, in restitution or restoration or as compensation for the losses and damages caused to said Debtor or plaintiffs as its Trustees, by the corrupt, fraudulent and illegal acts aforesaid.

A-60. Plaintiffs are entitled to recover from Williams and Nasco the sum of $5,000,000 with appropriate interest, together with all profits derived therefrom by said Williams and Nasco, in restitution and restoration of the losses and damages caused to the Debtor by Williams' corrupt, fraudulent and illegal acts. Plaintiffs and the

Debtor hereby repudiate the contract between the Debtor and Nasco, Exhibit "A(2)" annexed hereto, as a sham, and plaintiffs and the Debtor stand ready to treat and consider Williams or his creature Nasco as the owner and holder of 96,154 shares of the Debtor's common stock, and to deliver and return to Williams or Nasco all the dividends and benefits accrued or accruing or incident to the ownership of the above described 96,154 shares of the Debtor's common [fol. 30] stock, from the 24th day of July 1929 up to and including the present date, including any and all rights accrued or accruing or pertaining to said shares, by reason of any reorganization plan or agreement to be made in the reorganization proceeding above described and mentioned in paragraph "A-2" hereof, subject to any adjustments, liens or accountings required to be made in equity and good conscience.

B-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings with respect to 68,423 shares of the common stock of North American Company which the Debtor had a contract right to sell to Blue Ridge Corporation, now to be related by plaintiffs.

B-2. George Touche, John B. Niven, Andrew W. Tait, Charles R. Whitworth, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, William C. Bechert and Jacob P. Friedman were, at all of the times hereinafter mentioned and more particularly during the months of August and September of 1929, copartners doing business as accountants and auditors under the firm name and style of Touche, Niven & Co., and maintained an office for the practice of the profession of accounting and auditing in the City, County and State of New York.

B-3. In or about the month of August, 1929, Williams and Catchings conceived the idea of forming a corporation for the purpose of owning common stocks in various and sundry public utility and industrial corporations.

B-4. Accordingly, and during the month of August, 1929, Williams acting for and on behalf of the Debtor, and Catchings acting for and on behalf of Goldman Sachs Trad- [fol. 31] ing Corporation, caused Shenandoah to organize

Blue Ridge Corporation (hereinafter referred to as "Blue Ridge"), under and pursuant to the laws of the State of Delaware.

B-5. Williams acted as the agent of the Debtor in connection with the organization of Blue Ridge.

B-6. Goldman Sachs & Co. acted as the bankers in connection with the organization of Blue Ridge.

B-7. Shenandoah acted as the sponsor in connection with the organization of Blue Ridge.

B-8. At all the times hereinafter mentioned, and at all the dates subsequent to the organization of Blue Ridge, more particularly described in paragraph "B-4" of this complaint, the following named persons occupied the following positions of trust and responsibility in and with respect to Blue Ridge, to wit:

Harrison Williams, Director;
Clifford E. Stone, Director and President;
Sidney J. Weinberg, Director;
Waddill Catchings, Director;
John Foster Dulles, Director.

B-9. On or about the 17th day of August, 1929, Williams and Catchings orally agreed on the terms and conditions of the financing of Blue Ridge.

B-10. On the 19th day of August, 1929, the oral agreement made by and between Williams and Catchings with respect to the organization and financing of Blue Ridge was reduced to a written contract to which the Debtor, Goldman Sachs Trading Corporation, Shenandoah, Blue Ridge and Goldman Sachs & Co. were parties. A copy of [fol. 32] this agreement is annexed hereto and marked Exhibit "B(1)", and made a part hereof.

B-11. Pursuant to that agreement, Exhibit "B(1)" annexed hereto, Shenandoah agreed to purchase and Blue Ridge agreed to sell 6,250,000 shares of the common stock of Blue Ridge for $62,500,000.

B-12. In order to provide Shenandoah with the funds necessary to pay for the 6,250,000 shares of the common stock of Blue Ridge, the Debtor agreed to purchase from Shenandoah 375,000 shares of Shenandoah's common

stock and 375,000 shares of Shenandoah's preferred stock for the amount of $31,250,000, and Goldman Sachs Trading Corporation agreed to purchase from Shenandoah 375,000 shares of Shenandoah's common stock and 375,000 shares of Shenandoah's preferred stock for the amount of $31,250,000.

B-13. On the 21st day of August, 1929, the Debtor and Blue Ridge entered into an agreement for the purchase and sale of securities, a copy of which is annexed hereto marked Exhibit "B(2)", and made a part hereof. Pursuant to that agreement, the Debtor agreed to sell and Blue Ridge agreed to buy, among other securities, 68,423 shares of the common stock of North American Company for a price fixed in said agreement at $11,426,641.

B-14. On the 3rd day of September, 1929, at a meeting of the board of directors of the Debtor at which were present the following directors, to wit: Fogarty, Glass, Kilmarx, Narlian, Schroeder, Stone and the following officer, namely, Ross, the aforementioned contract between the Debtor and Blue Ridge, Exhibit "B(2)" annexed hereto, was duly ratified, approved and affirmed.

[fol. 33] B-15. During the months of August and September, 1929, and during the period of the organization and financing of Blue Ridge, the Debtor owned in excess of 839,000 shares of the common stock of North American Company, of which 796,578 shares had been acquired by the Debtor at an average cost of $9.69 per share.

B-16. Williams knew at the time said contract Exhibit "B(2)" annexed hereto, was executed between the Debtor and Blue Ridge that the Debtor was fully able to sell and deliver to Blue Ridge 68,423 shares of the common stock of North American Company.

B-17. Williams was at all times familiar with and fully cognizant of the rights of the Debtor as embodied in said contract with Blue Ridge, Exhibit "B(2)" annexed hereto.

B-18. During all of said dates and times Williams was fully cognizant of the Debtor's financial condition and its need for ready cash, as more particularly set forth hereinabove in paragraph "A-23".

B-19. Then and there and prior to the delivery by the Debtor to Blue Ridge of the securities set forth and described in the contract, Exhibit "B(2)" annexed hereto, Williams determined that he would prevent the Debtor from selling to Blue Ridge the entire block of 68,423 shares of the common stock of North American Company and that, for his own individual use and benefit, he would depriye the Debtor of the benefit of said contract to the extent of 68,423 shares of the common stock of North American Company.

B-20. At the time Williams came to this decision he alone was acting as Debtor's agent in connection with the making of the agreements for the financing of Blue Ridge and the [fol. 34] sale to Blue Ridge by the Debtor of the securities set forth and described in Exhibit "B(2)" annexed hereto; accordingly and by reason thereof, Williams was a fiduciary of and for the Debtor in connection with said contract of sale, Exhibit "B(2)" annexed hereto.

B-21. By reason of the facts set forth hereinabove, it was the duty of Williams to further the interests of the Debtor and to refrain from interfering with its contract rights to sell 68,423 shares of the common stock of North American Company to Blue Ridge.

B-22. Despite Williams' duty as a fiduciary of the Debtor not to impair the interests of the Debtor arising out of said contract, Exhibit "B(2)" annexed hereto, and the Debtor's right to sell 68,423 shares of the common stock of North American Company to Blue Ridge for $11,426,641, and in violation of Williams' fiduciary obligations, Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, conspired together and agreed and formed the deliberate design and purpose to misappropriate the benefits of such contract, Exhibit "B(2)" annexed hereto, to the extent of 68,423 shares of North American Company, amounting in price to the sum of $11,426,641, to the sole gain and advantage of Williams.

B-23. The divers acts and things done by Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, as hereinabove alleged and as more particularly set forth hereinafter, were all steps in this design and conspiracy in which all of the said persons named in this paragraph participated, and which were all done for the common purpose of depriving the Debtor of the benefits of

said contract with Blue Ridge, Exhibit "B(2)" annexed hereto, and to enable Williams to sell and deliver the 68,423 shares of the common stock of North American [fol. 35] Company owned by Williams and maintained by him in the names of New Empire Corporation, Electric Investment Corporation, Federal Utilities Inc. and Utilities Securities Corporation, his wholly owned corporate instrumentalities, rather than to permit the Debtor to sell and deliver 68,423 shares of the common stock of North American Company owned by it, as was the Debtor's right under and pursuant to the above mentioned contract with Blue Ridge, Exhibit "B(2)" annexed hereto.

B-24. The Debtor would have been able to realize the sum of $11,426,641 in cash from the sale and delivery of said 68,423 shares of the common stock of North American Company to Blue Ridge, included within the various securities specified in the contract, Exhibit "B(2)" annexed hereto, and would have made a profit on said sale in the amount of $10,763,622.13 but for the fraudulent acts of Williams in abusing the trust and confidence of the Debtor, in taking advantage of and overreaching the Debtor, and in causing the 68,423 shares of the common stock of North American Company owned by Williams and maintained by Williams in the names of New Empire Corporation, Electric Investment Corporation, Federal Utilities Inc. and Utilities Securities Corporation, his wholly owned corporate instrumentalities, to be sold and delivered to Blue Ridge in the place and stead of 68,423 shares of the common stock of North American Company owned by the Debtor, pursuant to the plan, scheme and conspiracy more particularly set forth above.

B-25. The Debtor could and would have performed the contract made by it as aforesaid with Blue Ridge, Exhibit "B(2)" annexed hereto, and the obligations on its part to be performed, according to the terms of said contract, to the Debtor's great gain and profit, more particularly at a time when the Debtor was hard-pressed for ready funds, [fol. 36] but for the violations of fiduciary obligations, duties and trusts and the wrongful acts and conduct of Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, as hereinabove and hereinafter set forth.

B 26. Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, well knowing the facts and transactions hereinbefore set forth and the rights and obligations of the Debtor and the parties in and to the premises, planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor, and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, creditors and debentureholders, they would so proceed as to enable Williams wrongfully to appropriate to his own individual use and benefit and to enable Williams to take, receive, acquire and retain for himself and for his own benefit said contract made as aforesaid by the Debtor with Blue Ridge, Exhibit "B(2)" annexed hereto, to the extent of 68,423 shares of the common stock of North American Company, and any and all rights and benefits accrued or which might accrue to the Debtor under said contract of sale to the extent of said shares of North American Company common stock, and to appropriate and retain to Williams, through his above named wholly owned corporate instrumentalities, the benefits of said contract of sale to the extent of said shares of North American common stock, and to exclude the Debtor therefrom without any consideration therefor; and said persons above named in this paragraph, in violation of their fiduciary obligations, duties and trusts, then and there secretly entered into a corrupt, fraudulent and illegal agreement and conspiracy with each other to do and cause to be done and to accomplish and to cause to be accomplished the aforesaid corrupt, fraudulent and illegal [fol. 37] objects and purposes, and Touche, Niven, Tait, Whitworth, Mendes, Clowes, Stempf, Wagner, Brown, Beckett and Friedman became parties to and acted in said plan, agreement and conspiracy as in this complaint set forth, and the acts and things herein complained of were done by the persons named in this paragraph in aid and in execution of said plan, agreement and conspiracy and said corrupt, fraudulent and illegal objects and purposes.

B 27. Pursuant to said plan and conspiracy, Williams did in fact fraudulently, corruptly and illegally procure Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, in violation of their duties, trusts and obligations to the Debtor, to agree on behalf of the Debtor with New Empire Corporation, Electric Investment Corpora-

tion, Federal Utilities Inc. and Utilities Securities Corporation to pay to New Empire Corporation $3,076,641 and to Electric Investment Corporation $1,670,000, and to Federal Utilities Inc. $3,340,000, and to Utilities Securities Corporation $3,340,000, in consideration of the delivery by New Empire Corporation, Electric Investment Corporation, Federal Utilities Inc. and Utilities Securities Corporation of 18,423, 10,000, 20,000 and 20,000 shares respectively, of the common stock of North American Company to Blue Ridge and to exclude the Debtor from its contract right as fixed in Exhibit "B(2)" annexed hereto, to sell and deliver 68,423 shares of the common stock of North American Company owned by the Debtor for the sum of $11,426,641, and said defendants named in this paragraph did in fact corruptly, fraudulently and illegally appropriate the benefits of said contract between the Debtor and Blue Ridge, Exhibit "B(2)" annexed hereto, to the extent of the 68,423 shares of common stock of North American Company to the use of Williams and for Williams' sole benefit, through his above named corporate instrumentalities, and did in fact [fol. 38] permit Williams to take as his own and to receive for his own individual use and benefit the fruits of said contract to the extent of 68,423 shares of the common stock of North American Company, Exhibit "B(2)" annexed hereto.

B-28. The Debtor received no valuable consideration nor any consideration or thing of value whatsoever, and none of the persons named as participating in this transaction paid to the Debtor any consideration at all for said appropriation by Williams of the Debtor's said property and contract right to sell and deliver 68,423 shares of the common stock of North American Company for the sum of $11,426,641, as specified in the agreement, Exhibit "B(2)" annexed hereto.

B-29. Touche, Niven, Tait, Whitworth, Mendes, Clowes, Stempf, Wagner, Brown, Bechert and Friedman cooperated with Williams herein and assisted him in the execution as aforesaid and as hereinafter set forth, of his said plan, agreement and conspiracy, and became parties thereto and to the carrying out thereof in violation of their duties, trusts and obligations to the Debtor, and in complete subservience to the wishes and decisions of Williams, and said persons above named in this paragraph acted as aforesaid with full and complete knowledge of, or being on notice of

and on inquiry as to all the facts herein set forth, the rights and obligations of the parties in and to the premises and the wrongful character of the transactions to which they were parties.

B-30. Pursuant to and in execution of said plan, agreement and conspiracy, and for the accomplishment thereof, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone, Ross and Williams, did and caused to be done and assisted in the doing of the acts and things hereinbefore [fol. 39] and hereinafter complained of, including among others, the following, to wit:

(a) Sometime in the latter part of the month of August or in the early part of ~~the~~ month of September, 1929, the exact date being now unknown to plaintiffs, they entered into a corrupt, fraudulent and illegal agreement with New Empire Corporation, Electric Investment Corporation, Federal Utilities, Inc. and Utilities Securities Corporation, to pay to said corporations the aggregate sum of $11,426,641 for the delivery by said corporations to Blue Ridge of 68,423 shares of the common stock of North American Company, in the following number of shares and in the following amounts:

Name	Shares	Amount
Utilities Securities	20,000	$3,340,000
Federal Utilities	20,000	3,340,000
Electric Investment	10,000	1,670,000
New Empire Corporation	18,423	3,076,641
Total	68,423	$11,426,641

(b) Thereafter and pursuant to said agreement, and on the 5th day of September, 1929, New Empire Corporation, Electric Investment Corporation, Federal Utilities, Inc. and Utilities Securities Corporation, did deliver the aggregate number of 68,423 shares of the common stock of North American Company to Blue Ridge, and were paid therefor the sum of $11,426,641 by the Debtor on the 23rd day of September, 1929;

(c) Thereafter and pursuant to said agreement and on the 23rd day of October and the 12th day of

November, 1929, they wrongfully caused the sum of $34,279.92 to be paid as purported interest due to New Empire Corporation, Federal Utilities Inc., [fol. 40] Utilities Securities Corporation and Electric Investment Corporation for the period from September 5th to September 23rd, 1929, in the following amounts and on the following dates:

Name	Date	Amount
Electric Investment Corporation	October 23, 1929	$5,010.00
Utilities Securities Corporation	October 23, 1929	10,020.00
Federal Utilities Inc.	October 23, 1929	10,020.00
New Empire Corporation	November 12, 1929	9,229.92

(d) They refrained and caused the Debtor to refrain from delivering 68,423 shares of the common stock of North American Company owned by the Debtor and from receiving $11,426,641 therefor as the Debtor had the right under and pursuant to the aforementioned contract with Blue Ridge, Exhibit "B(2)" annexed hereto;

(e) They refrained and caused the Debtor to refrain from making appropriate and authorized use of the Debtor's own common stock in North American Company, then and there owned and controlled by Debtor and available for delivery to Blue Ridge under and pursuant to said contract with Blue Ridge, Exhibit "B(2)" annexed hereto;

(f) They made no effort whatsoever and caused Debtor to refrain from making any effort whatsoever to fulfill the terms of said contract with Blue Ridge, by delivering to Blue Ridge 68,423 shares of the common stock of North American Company owned by the Debtor for the sole benefit of the Debtor;

(g) They used their positions of trust and responsibility and the powers vested in them by the Debtor [fol. 41] to prevent the Debtor from making any delivery of so much of the common stock of North American Company owned by the Debtor and main-

tained by the Debtor in its own possession and control, as would satisfy the terms and conditions of the contract with Blue Ridge, Exhibit "B(2)" annexed hereto;

(h) They misused the powers entrusted to them by the Debtor and made illegal, corrupt and fraudulent use of their powers for the sole purpose of corruptly enriching Williams, all in violation of their fiduciary duties, obligations and trusts as officers, directors, managers, agents and fiduciaries of and for the Debtor;

(i) They used their positions of trust and responsibility and the powers vested in them by the Debtor for Williams' own profit and for the purpose of depriving the Debtor of property and rights lawfully belonging to the Debtor, and for the purpose of depriving the Debtor of moneys and profits to which the Debtor alone was lawfully entitled, by causing certain corporate instrumentalities of Williams, to wit: New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation, to make delivery to Blue Ridge of 68,423 shares of the common stock of North American Company in the amounts and proportions set forth in subdivision "(a)" hereinabove, in the place and stead of the Debtor delivering 68,423 shares of the common stock of North American Company owned by the Debtor and maintained by it in its possession and control, under and pursuant to said contract with Blue Ridge, Exhibit "B(2)" annexed hereto, for the sum of $11,426,641;

[fol. 42] (j) They directed and instructed Touche, Niven & Company, the accountants and bookkeepers of the Debtor, to make such entries and erasures in the books of original entry and the books of account of the Debtor, as to conceal Debtor's rights under the contract, Exhibit "B(2)" annexed hereto, and to make it appear that New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation, the wholly owned corporate instrumentalities of Williams, were the actual vendors

of said 68,423 shares of the common stock of Nort American Company.

B-31. Pursuant to and in execution of said corrupt fraudulent and illegal plan, scheme and conspiracy, and for the accomplishment thereof, Touche, Niven, Tait, Whitworth, Mendes, Clowes, Stempf, Wagner, Brown, Bechert and Friedman, with full knowledge that Williams was acting in his own individual and personal interest and not for the benefit of the Debtor, assisted Williams in the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) Acting in a fiduciary capacity as the accountants and bookkeepers for the Debtor, and with full knowledge of the terms and conditions of the contract between the Debtor and Blue Ridge, Exhibit "B(2)" annexed hereto, they made and caused to be made improper and fraudulent entries on the books of original entry and books of account of the Debtor with respect to the aforementioned and described 68,423 shares of the common stock of North American Company;

(b) Acting in a fiduciary capacity as the accountants and bookkeepers for the Debtor, and with full knowledge of the terms and conditions of the contract be- [fol. 43] tween the Debtor and Blue Ridge, Exhibit "B(2)" annexed hereto, they refrained from making correct and proper entries in the Debtor's books of account and books of original entry with respect to the aforementioned 68,423 shares of the common stock of North American Company;

(c) Acting in a fiduciary capacity as the accountants and bookkeepers for the Debtor, and with full knowledge of the terms and conditions of the contract between Debtor and Blue Ridge, Exhibit "B(2)" annexed hereto, they actively assisted Williams in the execution of the aforementioned fraudulent and corrupt conspiracy with respect to the sale of 68,423 shares of the common stock of North American Company.

B-32. By reason of the foregoing Williams has made large and substantial profits the exact amounts of which

are unknown to plaintiffs. Williams has invested and reinvested the sums of $11,426,641 and $34,279.92 and by reason thereof has made and earned additional large and substantial profits the exact amounts of which are unknown to plaintiffs at the present time.

B-33. Williams took and received for his own individual use and benefit the said $11,426,641 obtained by New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation, for the delivery of the aforementioned 68,423 shares of the common stock of North American Company, and held and now holds the said $11,426,641 and all the profits derived therefrom in trust as the property of the Debtor herein and of plaintiffs as Trustees of said Debtor.

B-34. Williams took and received the sum of $34,279.92 obtained by New Empire Corporation, Federal Utilities [fol. 44] Inc., Utilities Securities Corporation and Electric Investment Corporation, as purported interest from the Debtor, as more particularly described hereinabove in paragraph "B-30 (c)", and now holds the said $34,279.92 and all the profits derived therefrom in trust as the property of the Debtor herein and of plaintiffs as Trustees of said Debtor.

B-35. By reason of the premises, each of the persons named as participants herein has become and is now liable to account to the Debtor and to plaintiffs as Trustees thereof, as aforesaid, for the sums of $11,426,641 and $34,279.92, received by Williams in the names of his corporate creatures, New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation, for the delivery by said New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation, of 68,423 shares of the common stock of North American Company to Blue Ridge as aforesaid.

B-36. No part of the said $11,426,641 and $34,279.92, for which each of the persons named as participating in this transaction are liable and accountable as aforesaid, has ever been paid or returned to said debtor or to plaintiffs as Trustees thereof, in restitution or restoration, or as compensation for losses and damages caused to said Debtor

or plaintiffs as its Trustees, by the corrupt, fraudulent and illegal acts as aforesaid.

B-37. The Debtor is entitled to recover from Williams, New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation the sums of $11,426,641 and $34,279.92 with appropriate interest, together with all profit derived therefrom by said Williams, New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment [fol. 45] Corporation, in restitution and restoration of the losses and damages caused to the Debtor by Williams' corrupt, fraudulent and illegal acts, and plaintiffs and the Debtor stand ready to deliver to Williams, New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation, and do hereby tender to said Williams, New Empire Corporation, Federal Utilities Inc., Utilties Securities Corporation and Electric Investment Corporation 68,423 shares of the common stock of North American Company and all the dividends and benefits accrued, accruing or incident to the ownership of the above described shares of the common sfock of North American Company from the 5th day of September 1929 up to and including the present date.

B-38. The Debtor is entitled to recover from Williams, New Empire Corporation, Federal Utilities Inc., Utilities Securities Corporation and Electric Investment Corporation the sum of $10,763,622.13, together with interest thereon from September 5, 1929.

C-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings in the "B" stock of American Cities Power & Light Corporation, now to be related by plaintiffs.

C-2. During the month of October, 1928, Debtor caused to be organized American Cities Power & Light Corporation (hereinafter referred to as "American Cities"), under and pursuant to the laws of the State of Virginia.

C-3. American Cities was organized with a capital of 2,000,000 shares of common stock denominated as Class "B" stock and 400,000 shares of preference stock denominated as Class "A" stock.

[fol. 46] C-4. In connection with the financing and organization of American Cities the Debtor purchased and acquired 1,600,000 shares of American Cities Class "B" stock at a net cost per share of $10.10.

C-5. By reason of his own-ship of 96% of the common stock of the Debtor Williams had a personal interest in maintaining the market price of the common stocks of the Debtor and American Cities.

C-6. Determined to maintain the market price of these stocks Williams caused Nasco, his wholly owned corporate instrumentality, to engage in trading operations from and after the organization of American Cities and up to and through the month of October, 1929, in the common stocks of American Cities and the Debtor.

C-7. In order to enable Nasco to engage in this venture and market operation, Williams caused the Debtor to lend to Nasco various sums of money in the amounts and at the times specified in paragraph "A-22" of this complaint.

C-8. In connection with the above described market operation Nasco purchased directly from the Debtor 65,600 shares of American Cities "B" stock at a price of $20. per share, amounting in the aggregate to the sum of $1,312,000.

C-9. In connection with the above described market operation, Nasco purchased from other individuals and sources 484,603 shares of American Cities "B" stock at a price aggregating the sum of $19,324,891.56.

C-10. During the course of this market operation, Nasco received as stock dividends declared by American Cities 3,448.979 shares of American Cities "B" stock.

[fol. 47] C-11. In the course of said market operation, Nasco sold 495,772 shares of the Class "B" stock of American Cities at a price amounting to the aggregate total of $18,548,746.74.

C-12. On the 31st day of October, 1929, and at or about the conclusion of said market operation, Nasco was in the possession of 57,879.979 shares of American Cities Class "B" stock. Subsequent to the said 31st day of October, 1929, and because of defaults of various purchasers, Nasco came into possession of an additional 12,316 shares of American Cities Class "B" stock.

C-13. On the said 31st day of October, 1929, and as the result of said venture, Williams, through Nasco had spent the sum of $2,088,144.82 in connection with the acquisition of said 57,879.979 shares of American Cities "B" stock.

C-14. On said 31st day of October, 1929, and as a result of said market operation in American Cities Class "B" stock Williams, through Nasco, his corporate creature, had incurred a loss and in addition owed the Debtor $10,477,000.

C-15. In connection with the above described market operation by Nasco which was financed by the loans from the Debtor to Nasco, as more particularly set forth in paragraph "A-22" hereinabove, Williams, through Nasco, made large and substantial profits, the exact amounts of which are unknown to plaintiffs at the present time.

C-16. Desiring to retain to himself and for his own benefit the profits described in paragraph "C-15" of this complaint, and at the same time desiring to avoid and minimize said loss and desiring to avoid and minimize any future risk of loss, and further desiring to reduce the amount of [fol. 48] Nasco's indebtedness to the Debtor, Williams on or about the 3rd day of December, 1929, or at some time shortly prior thereto, the exact date being unknown at the present time to plaintiffs, determined and decided that he would not bear the entire loss of this market operation and venture, and determined and decided that he would cause the Debtor to assume Nasco's investment in American Cities Class "B" stock in the manner and pursuant to the scheme, plan and device hereinafter to be outlined and related.

C-17. At the time Williams came to this decision he was, as has been more particularly related above, a fiduciary of and for the Debtor, its dominant stockholder, its managing director in fact, though not in name, the dictator of its policies, and the owner of 100% of the common stock of Nasco, his corporate creature.

C-18. By reason of the facts above set forth and particularly by reason of the loans which Williams caused the Debtor to make to Nasco, to enable Nasco to engage in the above described market operation, it was the duty of Williams to further the interests of the Debtor and to refrain from causing the Debtor to assume his personal invest-

ments which had become onerous and burdensome to him, and to make the Debtor whole with respect to the above described loans from the Debtor to Nasco, by causing the repayment of said loans in full in cash together with accrued interest, and to account to the Debtor for the substantial profits which he had made through the use of the Debtor's funds.

C-19. Despite Williams' duty as a fiduciary of the Debtor to further Debtor's interest, and in violation of his fiduciary obligations, Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross conspired together [fol. 49] and agreed and formed the deliberate design and purpose to cause the Debtor to assume the investment resulting from the above described market operation by Nasco, to the extent of 57,879.979 shares and such other shares as might be returned to Nasco by defaulting purchasers.

C-20. The divers acts and things done by Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, as hereinabove alleged and as more particularly set forth hereinafter, were all steps in this design and conspiracy in which all of the persons named in this paragraph participated, and which were all done for the common purpose of foisting upon the Debtor the shares of American Cities Class "B" stock acquired by Williams through his creature Nasco in the market operation conducted by Nasco above described, and to enable Williams to reduce the amount of Nasco's indebtedness to the Debtor without the payment of cash funds.

C-21. Accordingly, Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, well knowing the facts and transactions hereinbefore set forth and the rights and obligations of the parties in and to the premises, planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor, and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, debentureholders and creditors, they would so proceed as to enable Williams fraudulently, illegally and corruptly to foist upon the Debtor in Williams' interest and against the Debtor's interest the above described 70,195.979 shares of American Cities Class

"B" stock, thereby limiting the then existing loss incurred by Williams through his creature Nasco in the above described market operation, and at the same time causing [fol. 50] the Debtor to credit Nasco with the sum of $1,754,899.48 without the payment of any cash by Nasco, and the persons above named in this paragraph, in violation of their fiduciary obligations, duties and trusts, then and there secretly entered into a corrupt, fraudulent, unlawful and illegal agreement and conspiracy with each other to do, and to cause to be done and to accomplish and cause to be accomplished the aforesaid corrupt, fraudulent and illegal objects and purposes, and Nasco became a party to and acted in said plan, agreement and conspiracy, and the acts and things herein complained of were done by Nasco and the persons above named in this paragraph in aid and execution of said plan, agreement and conspiracy and said illegal, corrupt and fraudulent objects and purposes.

C-22. Pursuant to said plan, agreement and conspiracy, Williams did in fact procure Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, in violation of their duties, trusts and obligations to the Debtor, to take over from Nasco 70,195.979 shares of American Cities Class "B" stock at a price amounting to the sum of $1,754,899.48 and to apply said sum upon Nasco's indebtedness to the Debtor, more particularly described hereinabove in paragraph "A-22" of this complaint, and said persons named in this paragraph did in fact illegally, corruptly and fraudulently cause these acts to be done for the sole use and benefit of Williams, and did thereby in fact permit Williams to foist upon the Debtor the said 70,195.979 shares of American Cities Class "B" stock.

C-23. Pursuant to and in execution of said plan, agreement and conspiracy, and for the accomplishment thereof, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross did and caused to be done and assisted in [fol. 51] the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) They cooperated with Williams so as to cause it to appear that the venture by Nasco in American Cities Class "B" stock above described was to be deemed as though accomplished and done by Nasco

as agent for the Debtor, when in truth the contrary was the fact;

(b) They conspired with Williams to cover up, conceal and hide the fact that Nasco had for Williams' individual account conducted the market supporting operation in American Cities Class "B" stock, and instead agreed to act as though Nasco's market operation had been conducted for the account of the Debtor;

(c) They directed the officers of the Debtor to take over from Nasco 70,195.979 shares of American Cities Class "B" stock, acting on the false pretense that the market operation wherein said shares had been accumulated had been conducted for and on behalf of the Debtor;

(d) At a meeting of the Board of Directors of the Debtor held on the 3rd day of December, 1929, they caused pretended proceedings to be taken and pretended minutes to be made on the false assumption that the officers of the Debtor had theretofore taken over from Nasco its position with respect to the above-mentioned American Cities Class "B" stock, when the fact was that the officers had not so acted;

(e) Accordingly, said directors at the above described meeting adopted a purported resolution which [fol. 52] was false and fraudulent in fact, in the following words and figures, to wit:

"After a statement of explanation by the President, on motion duly made and seconded it was unanimously

"RESOLVED, that the action of the officers in behalf of this Corporation in taking over from North American Securities Company its position in the matter of B Stock of American Cities Power & Light Corporation (i. e., stock on hand and stock redeliverable to it upon sales not consummated) as of October 31, 1929, at market price of $25 as of that date, be and it hereby is approved."

(f) They caused the books of the Debtor to be altered, manipulated, erased and otherwise disturbed,

so as to show a false condition, and one which was not true in fact, namely, that the market operation conducted by Williams through Nasco in American Cities "B" stock as above described, was done as agent for the Debtor;

(g) They credited the indebtedness of Nasco to the Debtor on the Debtor's books with the sum of $1,754,899.48;

(h) They misrepresented to the Debtor's accountants and bookkeepers the true state of facts and affairs for the purpose of inducing said accountants and bookkeepers to make improper entries on the Debtor's books;

(i) By reason of said misrepresentations which they made to the Debtor's accountants and bookkeepers, they caused the accountants and bookkeepers to make entries and erasures on the Debtor's books and records [fol. 53] which were untrue, were false in fact, improper, were fraudulent and designed to conceal the true state of affairs;

(j) They made no effort whatsoever and caused the Debtor to refrain from making any effort whatsoever to impede Williams in the carrying out of his unlawful, fraudulent and corrupt conspiracy;

(k) They used their positions of trust and responsibility and the powers vested in them by the Debtor to aid and assist Williams in the carrying out of all the details of the above described fraudulent and corrupt plan;

(l) They misused the powers entrusted to them by the Debtor and made corrupt, fraudulent and illegal use of their said powers for the purpose of corruptly protecting Williams and relieving him of an onerous obligation and foisting an investment of Nasco on the Debtor, all in violation of their fiduciary duties, obligations and trusts as officers, directors and fiduciaries of and for the Debtor;

(m) They used their positions of trust and responsibility and the powers vested in them by the Debtor for the benefit of Williams and for the purpose of enabling

Williams to dump on the Debtor an onerous investment incurred by Williams, through Nasco, as a result of the above described market operation by Nasco in American Cities "B" stock.

C-24. Williams and Nasco were benefitted and enriched as a result of the above described unlawful, corrupt and fraudulent plan and conspiracy, and the Debtor thereby suffered great loss and harm.

C-25. Williams and Nasco have invested and reinvested the said $1,754,899.48, and the large and substantial profits [fol. 54] made and earned in connection with the trading in the Debtor's common stock, and by reason thereof have made and earned additional large and substantial profits the exact amounts of which are unknown to plaintiffs at the present time.

C-26. Since the conclusion of the above-described fraudulent plan and corrupt conspiracy, Williams and Nasco have held and now hold the said sum of $1,754,899.48 and all the profits derived therefrom and all the profits made and earned in connection with the market operation of Nasco in and with respect to the common stock of the Debtor as above set forth, in trust as the property of the Debtor herein, and plaintiffs as Trustees of said Debtor.

C-27. No part of said $1,754,899.48 and no part of the additional profits made and earned by Williams through Nasco in connection with the above described market operation, conducted by Nasco in and with respect to the common stock of the Debtor, for which defendants are accountable and liable as aforesaid has ever been paid or returned to the Debtor or to plaintiffs as Trustees thereof.

C-28. By reason of the premises each of the persons named as participants herein has become and is now liable to account to the Debtor and to plaintiffs as Trustees thereof as aforesaid for all the losses and damages and in addition, Williams is liable to account to the Debtor and to plaintiffs as Trustees thereof for all the profits made by use of the Debtor's funds, as aforesaid.

C-29. Debtor is entitled to recover from Williams and Nasco the sum of $1,754,899.48 with appropriate interest together with all profits derived therefrom by said defendants, in restitution and restoration of the losses and dam-

ages caused to the Debtor by Williams' illegal, corrupt and [fol. 55] fraudulent acts, and plaintiffs and the Debtor stand ready to deliver to Williams and Nasco and do hereby tender to said defendants 70,195.979 shares of American Cities Class "B" stock and all the dividends and benefits accrued, accruing or incident to the ownership of the above described shares of American Cities Class "B" common stock, from the 3rd day of December, 1929, up to and including the present date, and, in addition, Debtor is entitled to recover from Williams and Nasco all the profits made by them in the above described market operation in and with respect to the Debtor's common stock.

D-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings in the preferred stock of the Debtor now to be related by plaintiffs.

D-2. During the month of September, 1928, the Debtor issued and caused to be sold to numerous holders thereof 110,000 shares of a certain preferred stock of the Debtor described and denominated as "convertible preferred stock, optional dividend series" herein referred to as the "convertible preferred stock of 1928." Each share of said convertible preferred stock of 1928 was convertible at the option of the owner thereof into the Debtor's common stock at the rate of one share of common stock for each $118. par value of said convertible preferred stock of 1928. Thereafter, and by reason of declarations of stock dividends by the Debtor in and with respect to its own common stock, each said share of the convertible preferred stock of 1928 of the Debtor was convertible at the option of the owners and holders thereof into the common stock of the Debtor at the rate of one share of common stock for each $19.67 par value of said convertible preferred stock of 1928. Each said share of the convertible preferred stock of 1928 was redeemable [fol. 56] by the Debtor at any time on notice to the holders thereof at the rate of $110. per share plus accrued and unpaid dividends. The conversion rights of the owners and holders of said convertible preferred stock of 1928 terminated on the 25th day next following the Debtor's issuance of a notice of call for redemption of said convertible preferred stock of 1928 pursuant to the Debtor's power to redeem said convertible preferred stock of 1928.

D-3. During the month of June, 1929, the Debtor issued and caused to be sold to numerous owners and holders thereof 115,500 shares of a certain preferred stock of the Debtor described and denominated as "convertible preferred stock optional dividend series", herein referred to as the "convertible preferred stock of 1929." Each share of said convertible preferred stock of 1929 was convertible at the option of the owner and holder thereof into the Debtor's common stock at the rate of one share of common stock for each $118. par value of said convertible preferred stock of 1929. Thereafter and by reason of declarations of stock dividends by the Debtor in and with respect to its own common stock, each said share of the convertible preferred stock of 1929 of the Debtor was convertible at the option of the owners and holders thereof into the common stock of the Debtor at the rate of one share of common stock for each $39.33 par value of said convertible preferred stock of 1929. Each said share of the convertible preferred stock of 1929 was redeemable by the Debtor at any time on notice to the holders thereof at the rate of $110. per share plus accrued and unpaid dividends. The conversion rights of the owners and holders of said convertible preferred stock of 1929 terminated on the 25th day next following the Debtor's issuance of a notice of call for redemption of said convertible preferred stock of 1929, pursuant to the Debtor's power to redeem said convertible preferred stock of 1929.

[fol. 57] D-4. By reason of his ownership of upwards of 96% of the common stock of the Debtor, Williams had a personal interest in maintaining the market price of the common stock of the Debtor.

D-5. Determining to maintain the price of the common stock of the Debtor, Williams caused Nasco to engage in trading operations in the common stock of the Debtor beginning approximately with the year 1927 and extending continuously to and including 1936. During the course of said market operation Williams caused Nasco to purchase upwards of $32,000,000 worth of the common stock of the Debtor during the year 1929 and to sell during the same year upwards of $26,000,000 worth of the common stock of the Debtor exclusive of the sale of 96,154 shares of the common stock of the Debtor referred to in paragraphs

"A-36" to "A-60" of this complaint and other special sales.

D-6. During the course of the year 1929, the respective market prices of the Debtor's common stock and the Debtor's convertible preferred stocks of 1928 and 1929 were not equivalent in value, taking into account the conversion privileges attached to said convertible preferred stocks of 1928 and 1929, so that it became advantageous to the various owners and holders of the convertible preferred stocks of the Debtor to convert their said convertible preferred stocks into the common stock of the Debtor, and thereafter sell said shares on the market, thereby realizing a profit to themselves by reason of said conversion. Accordingly, and by reason of the aforementioned facts, professional speculators and market arbitrageurs would sell the common stocks of the Debtor which they did not own or possess at the time of the sale, and would complete the transaction and make delivery of the common stocks thereby sold by obtaining common stock from the Debtor by the [fol. 58] exercise of the conversion privileges attached to the convertible preferred stocks of the Debtor, as more particularly described hereinabove.

D-7. As a result of the facts hereinbefore pleaded, the market price of the Debtor's common stock was thereby depressed from time to time.

D-8. Because of Williams' investment in the common stock of the Debtor it was against his personal interest to permit the market price of the Debtor's common stock to depreciate.

D-9. Although the depression in the market value of the Debtor's common stock was contrary to the personal interest of Williams, it did not affect the asset value of the Debtor or its net worth and was a matter of complete indifference to the Debtor.

D-10. Desiring to avoid the impairment to his personal fortune caused by the depressive effect on the price of the common stock of the Debtor through the above described market operations of professional speculators and market arbitrageurs, Williams determined to prevent and to render difficult and uneconomic the aforesaid market operations by causing the market price of the Debtor's common

stock to be maintained at an exchange parity with respect to the aforesaid convertible preferred stocks.

D-11. In order to achieve said purpose, Williams determined to cause the Debtor to purchase with its own funds sufficient amounts in number of the shares of its convertible preferred stocks as to achieve an exchange parity in price on the market of said convertible preferred stocks with respect to the Debtor's common stock.

D-12. Accordingly, Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, well know- [fol. 59] ing the facts and transactions hereinbefore set forth, and the rights and obligations of the parties in and to the premises, planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor, and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, debentureholders and creditors, they would so proceed as to enable Williams corruptly, fraudulently and illegally to carry out his above described plan and purpose for his own personal benefit and to the Debtor's harm and loss, by causing the Debtor to purchase in Williams' own personal interest a net amount of 22,747 shares of the Debtor's convertible preferred stock of 1928 at a cost of $3,894,432.70; and a net amount of 28,432 shares of Debtor's convertible preferred stock of 1929 at a cost of $5,160,993.86, resulting in a total net expenditure of $9,055,426.56 for the repurchase of said convertible preferred stocks, and said persons above named in this paragraph, in violation of their fiduciary obligations, duties and trusts, then and there secretly entered into an illegal, corrupt and fraudulent agreement, plan and conspiracy with each other and with Williams, to cause to be done and to accomplish and cause to be accomplished the aforesaid illegal, corrupt and fraudulent objects and purposes, and Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, became parties to and acted in said plan, agreement and conspiracy as herein set forth, and the acts and things herein complained of were done by the said persons above named in this paragraph, in aid and execution of said plan, agreement and conspiracy and said corrupt, fraudulent and illegal objects and purposes.

D-13. Pursuant to and in execution of said plan, agreement and conspiracy, and for the accomplishment thereof, Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross did and caused to be done and [fol. 60] assisted in the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) They caused the Debtor to repurchase a net amount of 22,747 shares of the Debtor's convertible preferred stock of 1928 for the sum of $3,894,432.70, and a net amount of 28,432 shares of the convertible preferred stock of 1929 for the sum of $5,160,993.86;

(b) They caused the Debtor to expend the net sum of $9,055,426.56 of its own funds in accomplishing said purchases at a time when the Debtor was hard-pressed for ready cash, as more particularly hereinabove outlined and set forth in paragraph "A-23" of this complaint, and for the accomplishment of this purpose they caused the Debtor to increase its borrowings from banks and its funded indebtedness;

(c) They caused said acts to be done entirely in the personal interest of Williams;

(d) They caused said acts to be done, well knowing that they were entirely contrary to the interests of the Debtor;

(e) They caused said purchases to be made and said acts to be done at a time when the Debtor was obligated in amounts exceeding the sum of $44,000,000 to the owners and holders of various debentures made and issued by the Debtor and at a time when the Debtor was obligated to various banks in various amounts aggregating up to and including the sum of $14,000,000;

(f) They caused said acts to be done and said purchases to be made and said sums of money to be expended in violation of their duties and trusts and obligations to the Debtor;

[fol. 61] (g) They cooperated with Williams to cause the Debtor to make said purchases and expenditures contrary to the Debtor's own interest;

(h) They conspired with Williams to cover up, conceal and hide the real purpose of said purchases by failing to take any proceedings as the board of directors of the Debtor in connection with the initiation of said acts and purchases, and by failing to record any minutes of any decision on the minute book or other record of the Debtor of any determination by them to make said purchases and expenditures of the Debtor's money in Williams' own personal interest, and by instructing the officers of the Debtor to cause said purchases to be made and the Debtor's moneys and funds to be expended for said purchases in the sole interest of Williams, not having established said action as a duly authorized corporate act and policy of the Debtor;

(i) They refrained and caused the Debtor to refrain from making any effort whatsoever to impede and prevent Williams from the carrying out of his illegal, fraudulent and corrupt conspiracy;

(j) They refrained and caused the Debtor to refrain from exercising its contract and legal rights to redeem said convertible preferred stocks of the Debtor at the respective redemption values thereof, well knowing that the exercise of the Debtor's legal and contract rights of redemption of the above described convertible preferred stocks was contrary to the interest of Williams and not desired by him, in that the effect of a notice of call of redemption by the Debtor would have precipitated a flood of conversions by the owners and holders of the above mentioned preferred stocks which would have resulted in further depressing the market [fol. 62] price of the Debtor's common stock, contrary to the personal and individual interest of Williams;

(k) They misused the powers entrusted to them by the Debtor and made corrupt, fraudulent and illegal use of their said powers for the purpose of corruptly aiding and enriching Williams and abetting and favoring the execution of Williams' immoral and corrupt purposes, all in violation of their fiduciary duties, obligations and trusts as officers, directors, agents and fiduciaries of and for the Debtor;

(l) They used their positions of trust and responsibility and the powers vested in them by the Debtor for Williams' sole benefit and to deprive the Debtor of contract rights lawfully belonging to the Debtor, and to prevent the Debtor from exercising its lawful and contract rights with respect to redemption privileges.

D-14. The effectuation of the aforementioned corrupt and fraudulent plan, scheme and conspiracy, achieved the same result as if Williams, well knowing all the foregoing facts and circumstances, had purchased the above described shares of the Debtor's convertible preferred stock and had immediately thereupon resold the said shares for the sum of $9,055,426.56 to the Debtor with full knowledge that at said time the Debtor was obligated to debentureholders and creditors in an amount aggregating a total exceeding the sum of $50,000,000.

D-15. Williams was benefitted and enriched as a result of the above described unlawful, corrupt and fraudulent plan and conspiracy and the effectuation thereof, and the Debtor suffered grievous harm thereby.

[fol. 63] D-16. No part of the $9,055,426.56 for which the persons participating in this transaction are accountable and liable as aforesaid has ever been paid or returned to said Debtor, or to plaintiffs as Trustees thereof, in restitution or restoration or as compensation for the losses and damages caused to said Debtor or plaintiffs as its Trustees, by reason of the corrupt, fraudulent and illegal acts aforesaid.

D-17. By reason of the aforesaid corrupt and fraudulent acts and conspiracy, the Debtor has been damaged in the sum of $9,055,426.56, with interest thereon from the respective dates of the expenditures made pursuant to the above mentioned fraudulent and corrupt plan and conspiracy, and each of the persons named as participants herein has become and is now liable to account to the Debtor and to plaintiffs as Trustees thereof as aforesaid for the sum of $9,055,426.56.

D-18. Debtor is entitled to recover from Williams the sum of $9,055,426.56 with appropriate interest in restitution and restoration of the losses and damages caused to it by Williams' illegal, corrupt and fraudulent acts, and

plaintiffs and the Debtor stand ready to treat and consider Williams as the owner and holder of 22,747 shares of the convertible preferred stock of 1928 of the Debtor, and 28,432 shares of the convertible preferred stock of 1929 of the Debtor, and to deliver and return to him all the dividends and benefits accruing or incident to the ownership of the above described shares from the dates of the respective purchases thereof up to and including the present date, including any and all rights accruing or pertaining to said shares by reason of any reorganization plan or agreement to be made in the reorganization proceeding above described in paragraph "A-2" of this complaint, subject to any adjustments, liens or accountings required to be made in equity and good conscience.

[fol. 64] E-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings in the exchange of Electric Shareholdings stock for the common stock of Blue Ridge, now to be related by plaintiffs.

E-2. During the month of November, 1938, the Debtor owned 660,569 shares of the common stock of Electric Shareholdings Corporation, a corporation organized under the laws of the State of Delaware, and through Utilities Shares Corporation, Debtor's wholly owned subsidiary, Debtor owned 76,620 additional shares of Electric Shareholdings common stock.

E-3. In or about the month of November, 1938, Williams conceived the idea of having the Debtor exchange its holdings in the common stock of Electric Shareholdings for shares of the commmon stock of Blue Ridge in which the Debtor had a substantial minority interest.

E-4. Accordingly, and during the month of November, 1938, Williams acting for and on behalf of the Debtor and Earl Baillie acting for and on behalf of Tri-Continental Corporation, a corporation organized under the laws of the State of Virginia, and Selected Industries Incorporated, a corporation incorporated under the laws of the State of Maryland (hereinafter referred to as the "Tri-Continental interests"), orally agreed that the Debtor and the Tri-Continental interests would exchange their respective holdings in the common stocks of Electric Share-

holdings and Blue Ridge at the ratio of one share of the common stock of Electric Shareholdings for 1½ shares of the common stock of Blue Ridge.

E-5. At the time that he participated in the oral negotiations with Earl Baillie as aforesaid, Williams was a [fol. 65] fiduciary of and for the Debtor and was the owner of the majority of the common stock of the Debtor.

E-6. No one but Williams participated in these negotiations with the representatives of the Tri-Continental interests on behalf of the Debtor.

E-7. Williams acted as the sole agent of the Debtor in connection with said negotiations with the Tri-Continental interests with respect to the above described exchange.

E-8. At the time that he participated in the above described negotiations and in the formation of the oral agreement above described Williams knew or should have known that the Debtor owned 660,569 shares of the common stock of Electric Shareholdings, and through Utilities Shares Corporation the Debtor owner 76,620 additional shares of the common stock of Electric Shareholdings.

E-9. During all these times New Empire owned 12,900 shares of the common stock of Electric Shareholdings and Onondaga owned 2,700 shares of the common stock of Electric Shareholdings.

E-10. Then and there and prior to the execution of the written agreement, more particularly set forth, and described herein in paragraph "E-12" of this complaint, Williams determined that he would prevent the Debtor from obtaining the full benefits of said agreement and that for his own use and benefit he would deprive the Debtor of the full benefit of said contract to the extent of the holdings of the common stock of Electric Shareholdings of New Empire and Onondaga, his wholly owned corporate instrumentalities.

E-11. At the time Williams came to this decision he alone was acting as the Debtor's agent in connection with [fol. 66] the making of the agreement for the exchange of the Debtor's holdings of the common stock of Electric Shareholdings for the common stock of Blue Ridge. Accordingly and by reason of these facts Williams was a fidu-

ciary of and for the Debtor in connection with said contract.

E-12. On the 18th day of November, 1938, the oral agreement made by and between Williams and Earl Baillie with respect to the exchange of the common stocks of Electric shareholdings and Blue Ridge was reduced to a written contract to which the Debtor, American Cities, Tri-Continental Corporation and Selected Industries Incorporated were parties. A copy of this agreement is annexed hereto and marked Exhibit "E" and made a part hereof.

E-13. Pursuant to this agreement, Exhibit "E" annexed hereto, the Debtor agreed to exchange 594,432 shares of the common stock of Electric Shareholdings for 891,648 shares of the common stock of Blue Ridge.

E-14. Williams was familiar with and was fully cognizant of the rights of the Debtor as embodied in said contract Exhibit "E" annexed hereto.

E-15. By reason of the facts set forth hereinabove it was the duty of Williams to further the interests of the Debtor and to refrain from interfering with its contract right to make the aforementioned exchange of the common stocks of Electric Shareholdings for Blue Ridge.

E-16. At a time when the Debtor was entitled by contract to 891,648 shares of the common stock of Blue Ridge on delivery by it of 594,432 shares of the common stock of Electric Shareholdings, pursuant to the agreement Ex- [fol. 67] hibit "E" annexed hereto, which contract the Debtor was fully able to perform, Williams, the Debtor's dominant stockholder and managing fiduciary, caused the Debtor against its own interest, to exchange 19,350 shares of the common stock of Blue Ridge for 12,900 shares of the common stock of Electric Shareholdings with New Empire, and to exchange 4,050 shares of Blue Ridge for 2,700 shares of the common stock of Electric Shareholdings with Onondaga. Said conduct and action by Williams was corrupt, fraudulent and illegal and resulted in a loss to the Debtor of the benefits of the aforementioned contract to the extent of the shares of the common stock of Blue Ridge exchanged by it with Williams through New Empire and Onondaga, his wholly owned corporate creatures.

E-17. Despite Williams' duty as a fiduciary of the Debtor not to impair the interests of the Debtor arising out of the said contract, Exhibit "E" annexed hereto, and the Debtor's right to exchange 594,432 shares of the common stock of Electric Shareholdings for 891,648 shares of the common stock of Blue Ridge, and in violation of his fiduciary obligations, Williams, Finney, Johnson, Kilmarx, McCornack, Smith and Andersen, conspired together and agreed and formed the deliberate design, plan and purpose to misappropriate the benefits of said contract to the extent of 15,600 shares of the common stock of Electric Shareholdings owned by Williams in the names of New Empire and Onondaga to the gain and advantage of Williams.

E-18. The divers acts and things done by said Williams, Finney, Johnson, Kilmarx, McCornack, Smith and Andersen, as hereinabove alleged and as more particularly set forth hereinafter, were all steps in this design and conspiracy in which all of the said persons named in this [fol. 68] paragraph participated, and which were all done for the common purpose of depriving the Debtor of the benefits of said contract with the Tri-Continental interests, Exhibit "E" annexed hereto, and to enable Williams to exchange the shares of the common stock of Electric Shareholdings owned by him and maintained in the names of Onondaga and New Empire, his wholly owned corporate instrumentalities, for shares of the common stock of Blue Ridge owned by the Debtor rather than permit the Debtor to exchange its own shares of the common stock of Electric Shareholdings Corporation to the extent of 15,600 shares in number, as was its right under and pursuant to the above mentioned contract, Exhibit "E" annexed hereto.

E-19. The Debtor would have been able to retain 23,450 shares of the common stock of Blue Ridge by the exchange of 15,600 shares of the common stock of Electric Shareholdings included within the 594,432 shares of the common stock of Electric Shareholdings specified in the contract, Exhibit "E" annexed hereto, but for the fraudulent acts of Williams in abusing the trust and confidence of the Debtor, in taking advantage of, and overreaching the Debtor, and in causing 15,600 shares of the common stock of Electric Shareholdings owned by Williams and maintained in the names of New Empire and Onondaga, his wholly owned corporate instrumentalities, to be exchanged

for 23,400 shares of the common stock of Blue Ridge in the place and stead of 15,600 shares of the common stock of Electric Shareholdings owned by the Debtor pursuant to the plan, scheme and conspiracy more particularly elaborated and set forth herein.

E-20. Williams, Finney, Johnson, Kilmarx, McCornack, Smith and Andersen, well knowing the facts and trans- [fol. 69] actions hereinbefore set forth and the rights and obligations of the Debtor and the parties in and to the premises, planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor, and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, debentureholders and creditors, they would so proceed as to enable Williams wrongfully to appropriate to his own use and benefit and to enable him to take, receive, acquire and to retain for himself and for his own benefit said contract made as aforesaid by the Debtor with the Tri-Continental interests, Exhibit "E" annexed hereto, to the extent of 23,400 shares of the common stock of Blue Ridge and any and all rights and benefits accruing or which might accrue to Debtor under said contract, and to appropriate and retain the benefits of said contract and to exclude the Debtor therefrom to the extent of 15,600 shares of the common stock of Electric Shareholdings owned by Williams, and maintained by him in the names of Onondaga and New Empire, without any consideration therefor and said persons above named in this paragraph in violation of their fiduciary obligations, duties and trusts then and there secretly entered into a corrupt and unlawful agreement and conspiracy with each other to do and cause to be done and to accomplish and to cause to be accomplished the aforesaid illegal, corrupt, and fraudulent objects and purposes.

E-21. Pursuant to said plan and conspiracy, Williams did in fact procure Finney, Johnson, Kilmarx, McCornack, Smith and Andersen, in violation of their duties, trusts and obligations to the Debtor, to agree on behalf of the Debtor with New Empire and Onondaga to exchange 23,400 shares of the common stock of Blue Ridge for 15,600 shares of the [fol. 70] common stock of Electric Shareholdings owned by Williams and maintained by Williams in the names of New Empire and Onondaga and to exclude the Debtor from

the benefits of its contract right as fixed in Exhibit "E" annexed hereto to exchange 594,462 shares of the common stock of Electric Shareholdings owned by the Debtor for 891,648 shares of the common stock of Blue Ridge to the extent of the above described 15,600 shares of the common stock of Electric Shareholdings and said persons named in this paragraph, did in fact corruptly, fraudulently and illegally appropriate a portion of the benefits of said contract between the Debtor and the Tri-Continental interests, Exhibit "E" annexed hereto, to the use of Williams and for Williams' sole benefit, and did in fact permit Williams to take as his own and to receive for his own individual benefit the fruits of said contract, Exhibit "E" annexed hereto, to the extent of 23,400 shares of the common stock of Blue Ridge for 15,600 shares of the common stock of Electric Shareholdings owned by Williams and maintained by him in the names of New Empire and Onondaga.

E-22. The Debtor received no consideration whatsoever, and none of the persons named in paragraph "E-21" of this complaint paid to the Debtor any consideration for said appropriation by Williams of the Debtor's said property and contract right to exchange the shares of the common stock of Electric Shareholdings owned by it for the common stock of Blue Ridge with the Tri-Continental interests in the proportion specified in the agreement, Exhibit "E" annexed hereto.

E-23. Pursuant to and in execution of said plan, agreement and conspiracy, and for the accomplishment thereof, Finney, Johnson, McCornack, Smith, Andersen and Williams did and caused to be done and assisted in the doing [fol. 71] of the acts and things hereinbefore and hereinafter complained of including among others the following, to wit:

(a) On the 18th day of November, 1938, they caused the Debtor to exchange 23,400 shares of the common stock of Blue Ridge for 15,600 shares of the common stock of Electric Shareholdings owned by Williams and maintained by him in the names of New Empire and Onondaga;

(b) On the 21st day of November, 1938, at a meeting of the board of directors of the Debtor at which were present the following directors, to wit: Finney, Johnson, Kilmarx, McCornack and Smith, and the following

officer, namely, Andersen, they caused pretended proceedings to be taken whereby said exchange of stocks with New Empire an Onondaga were ratified and approved;

(c) They caused said acts to be done entirely in the personal interest of Williams;

(d) They caused said acts to be done well knowing that they were entirely contrary to the interests of the Debtor;

(e) They caused said acts to be done and said exchanges to be made in violation of their duties and trusts and obligations to the Debtor;

(f) They cooperated with Williams to cause the Debtor to make said exchanges contrary to the Debtor's own interests;

(g) They refrained and caused the Debtor to refrain from making any effort whatsoever to impede and prevent Williams from carrying out his unlawful, fraudulent and corrupt conspiracy;

(h) They refrained and caused the Debtor to refrain [fol. 72] from taking the full benefit of said contract with the Tri-Continental interests, Exhibit "E" annexed hereto;

(i) They refrained and caused the Debtor to refrain from making appropriate and authorized use of the shares of the common stock of Electric Shareholdings then and there owned by the Debtor and available for exchange for the common stock of Blue Ridge pursuant to the contract, Exhibit "E" annexed hereto to the extent of the 13,600 shares of the common stock of Electric Shareholdings owned by Williams and maintained by him in the names of New Empire and Onondaga;

(j) They refrained and caused the Debtor to refrain from making any effort whatsoever to fulfill the terms of said contract with the Tri-Continental interests by delivering only the shares of the common stock of Electric Shareholdings owned by the Debtor;

(k) They used their positions of trust and responsibility and the powers vested in them by the Debtor to

prevent the Debtor from taking the full benefit of said contract "E" annexed hereto;

(l) They misused the powers entrusted to them by the Debtor and made corrupt, fraudulent and illegal use of their said powers for the purpose of enriching Williams, all in violation of their fiduciary duties, obligations and trusts as officers, directors and fiduciaries of and for the Debtor;

(m) They used their positions of trust and responsibility and the powers vested in them by the Debtor for Williams' own profit to deprive the Debtor of property [fol. 73] and rights lawfully belonging to the Debtor and to deprive the Debtor of profits to which the Debtor alone was lawfully entitled by permitting New Empire and Onondaga to obtain 23,400 shares of the common stock of Blue Ridge for 15,600 shares of the common stock of Electric Shareholdings.

E-25. Williams, New Empire and Onondaga took and received the said 23,400 shares of the common stock of Blue Ridge for 15,600 shares of the common stock of Electric Shareholdings, and held and now hold the said 23,400 shares of the common stock of Blue Ridge and all the profits derived therefrom in trust as the property of the Debtor herein and of plaintiffs as Trustees of said Debtor.

E-26. By reason of the premises, each of the persons named as participating in this transaction has become and now is liable to account to the Debtor and to the plaintiffs as Trustees thereof, as aforesaid, for 23,400 shares of the common stock of Blue Ridge received by Williams, New Empire and Onondaga, as aforesaid.

E-27. No part of the said 23,400 shares of the common stock of Blue Ridge for which each of the persons named as participating in this transaction are accountable and liable as aforesaid has ever been returned to the Debtor or to plaintiffs as Trustees thereof in restitution or restoration or as compensation for the losses and damages caused to the Debtor or plaintiffs, as its Trustees, by their wrongful, corrupt and fraudulent acts as aforesaid.

E-28. The Debtor is entitled to recover from Williams, New Empire and Onondaga the said 23,400 shares of the

common stock of Blue Ridge with all dividends and profits acruing thereon, in restitution and restoration of the losses [fol. 74] and damages caused to it by Williams' wrongful, corrupt and fraudulent acts, and plaintiffs and the Debtor stand ready to return to Williams, New Empire and Onondaga the aforementioned 15,600 shares of the common stock of Electric Shareholdings and to deliver and return to him or them all the dividends and benefits accrued or accruing or incident to the ownership of the above described common stock of Electric Shareholdings, from the 18th day of November, 1938 up to and including the present day.

F-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings with the Debtor with respect to 18,000 shares of the common stock of Detroit Edison Company which the Debtor had a contract right to repurchase from Blue Ridge pursuant to Exhibit "B(2)" annexed to this complaint.

F-2. Pursuant to the above mentioned contract, Exhibit "B(2)" annexed hereto, the Debtor sold 18,000 shares of the common stock of Detroit Edison Company to Blue Ridge on August 21, 1929 at a price of $349. per share, making an aggregate total of $6,282,000.

F-3. Pursuant to the aforementioned contract, Exhibit "B(2)" annexed hereto, the Debtor had a contract right to repurchase said shares at a price of $351. per share.

F-4. Pursuant to the above mentioned contract, Exhibit "B(2)" annexed hereto, the Debtor's right, option or election to repurchase the above mentioned 18,000 shares of the common stock of Detroit Edison Company could be exercised by the Debtor during the 30 day period next succeeding September 5, 1929.

[fol. 75] F-5. On the 24th day of September, 1929, the common stock of the Detroit Edison Company was selling in the open market at a price of $376. per share.

F-6. The Debtor could and would have exercised the option contained in the contract made by it as aforesaid with Blue Ridge, Exhibit "B(2)" annexed hereto, to the Debtor's great gain and profit, but for the violations of fiduciary obligations, duties and trusts and the wrongful acts and conduct of Williams, Fogarty, Freeman, Glass,

Kilmarx, Narlian, Schroeder, Stone and Ross as hereinabove and hereinafter set forth.

F-7. Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross well knowing the facts and transactions hereinabove set forth and the rights and obligations of the Debtor and the parties in and to the premises planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor, and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, creditors and debentureholders, they would so proceed as to prevent the Debtor from exercising the above described option to the extent of 18,000 shares of the capital stock of Detroit Edison Company and to exclude the Debtor therefrom without any consideration therefor; and said persons above named in this paragraph in violation of their fiduciary obligations, duties and trusts then and there secretly entered into a corrupt, fraudulent and illegal agreement and conspiracy with each other to do and cause to be done and to accomplish and to cause to be accomplished the aforesaid corrupt, fraudulent, and illegal objects and purposes.

[fol. 76] F-8. Pursuant to said plan, agreement and conspiracy, Williams did in fact wrongfully, fraudulently and illegally procure Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross in violation of their duties, trusts and obligations to the Debtor, to refuse on behalf of the Debtor to exercise its option and contract right to repurchase the above described 18,000 shares of the common stock of Detroit Edison Company and to exclude the Debtor from its contract right as fixed in Exhibit "B(2)" annexed hereto, to repurchase such shares of the common stock of Detroit Edison Company at a price of $351. per share and to prevent the Debtor from selling said shares on the open market at the enhanced and increased market price of $376. per share; and said persons named in this paragraph did in fact negligently, wilfully and corruptly fail to take advantage of the contract right which the Debtor had pursuant to said contract, Exhibit "B(2)" annexed hereto, to the extent of 18,000 shares of the common stock of Detroit Edison Company to the Debtor's loss of $450,000.00.

F-9. The Debtor received no valuable consideration nor any consideration of any value whatsoever and none of the

persons named in paragraph "F-6" of this complaint paid to the Debtor any consideration at all for said negligent, wilful, corrupt and wasteful failure to exercise the Debtor's contract right to purchase the above mentioned 18,000 shares of the common stock of Detroit Edison Company pursuant to the contract, Exhibit "B(2)" annexed hereto.

F-10. Pursuant to and in execution of said plan, agreement and conspiracy, and for the accomplishment thereof, Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross did and caused to be done and assisted in the doing of the acts and things hereinbefore [fol. 77] and hereinafter complained of including among others the following to wit:

(a) They refrained and caused the Debtor to refrain from exercising the Debtor's contract right, option and election to repurchase 18,000 shares of the common stock of Detroit Edison Company at $351. per share and from selling said shares at the increased market price of $376. per share, as the Debtor had the right under and pursuant to the aforementioned contract with Blue Ridge, Exhibit "B(2)" annexed hereto;

(b) They refrained and caused the Debtor to refrain from making any effort whatsoever to fulfill the terms of said contract with Blue Ridge by repurchasing from Blue Ridge 18,000 shares of the common stock of Detroit Edison Company;

(c) They used their positions of trust and responsibility and the powers vested in them by the Debtor to prevent the Debtor from repurchasing 18,000 shares of the common stock of Detroit Edison Company pursuant to the terms and conditions of the contract with Blue Ridge, Exhibit "B(2)" annexed hereto;

(d) They misused the powers entrusted to them by the Debtor and made corrupt, fraudulent, negligent and wasteful use of their powers for the sole purpose of accomplishing the purposes, wishes and desires of Williams, all in violation of their fiduciary duties, obligations and trusts as officers, directors, managers, agents and fiduciaries of and for the Debtor.

F-11. By reason of said defendants' wasteful and negligent acts as above described, the Debtor suffered a loss amounting to the sum of $450,000.00.

[fol. 78] F-12. By reason of the premises each of the persons named as participants herein has become and is now liable to account to the Debtor and to plaintiffs as Trustees thereof as aforesaid, for the sum of $450,000.00.

F-13. No part of the said $450,000.00 for which defendants are liable and accountable as aforesaid has ever been paid or returned to the Debtor or to plaintiffs as Trustees thereof in restitution and restoration, or as compensation for the losses and damages caused to the Debtor or to plaintiffs as its Trustees by the negligent, corrupt and wasteful acts of said defendants as aforesaid.

G-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings with the Debtor with respect to the shares of Commercial Investment Trust and Stone & Webster stock which the Debtor sold to Blue Ridge, pursuant to Exhibit "B(2)" annexed to this complaint.

G-2. Pursuant to the above mentioned contract, Exhibit "B(2)" annexed hereto, the Debtor sold 29,200 shares of the stock of Commercial Investment Trust and 7,900 shares of the stock of Stone & Webster to Blue Ridge on August 21, 1929, at the following prices and amounts:

29,200 shs.	Commercial Invest. Trust	@ 185 —	$5,402,000.
7,900 "	Stone & Webster	@ 160 —	1,311,400.
			$6,713,400.

G-3. At the time that the Debtor entered into the above mentioned contract, Exhibit "B(2)" annexed hereto, the Debtor did not own the shares of stock of Commercial Investment Trust and Stone & Webster mentioned in paragraph "G-2" hereinabove.

[fol. 79] G-4. At the time the Debtor entered into the contract with Blue Ridge, Exhibit "B(2)" annexed hereto, no provision was made to protect the Debtor against a rise in the market price of the shares of Commercial Investment Trust and Stone & Webster, more particularly mentioned and described in paragraph "G-2" of this complaint.

G-5. At the time the Debtor entered into the contract, Exhibit "B(2)" annexed hereto, Williams, Fogarty, Free-

man, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, wrongfully, negligently and illegally failed to protect the Debtor against a rise in the market price of said stocks.

G-6. Pursuant to the above mentioned contract, Exhibit "B(2)" annexed hereto, and on the 5th day of September, 1929, the Debtor delivered to Blue Ridge the shares of stock set forth and described in paragraph "G-2" herein at the prices and in the amounts mentioned in paragraph "G-2" of this complaint.

G-7. In order to fulfill its obligations under the above mentioned contract, Exhibit "B(2)" annexed hereto, and on the 5th day of September, 1929, the Debtor purchased the shares of stock set forth and described in paragraph "G-2" of this complaint at the following prices and amounts:

29,200 shs. Commercial Invest. Trust	@ 207 —	$6,044,400.
7,900 shs. Stone & Webster	@ 198 —	1,564,200.
		$7,608,600.

G-8. The failure of Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross to make provision on the 21st day of August, 1929 for the purchase of the shares of stock of Commercial Investment Trust and Stone & Webster at or about the prices at which the said [fol. 80] shares of stock were sold in the contract, Exhibit "B(2)" annexed hereto, was wrongful, negligent and illegal and resulted in a loss to the Debtor of $895,200.

G-9. The Debtor could and would have been able to protect itself against a rise in the market price of the stock of Commercial Investment Trust and Stone & Webster to the Debtor's great gain and profit, but for the violations of fiduciary obligations, duties and trusts and the negligent, wrongful and illegal acts and conduct of Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, as hereinabove set forth.

G-10. By reason of said wasteful and negligent acts as above described of Williams, Fogarty, Freeman, Glass, Kilmarx, Narlian, Schroeder, Stone and Ross, the Debtor suffered a loss amounting to the sum of $895,200, and said

persons named in this paragraph have become and are now liable to account to the Debtor and to plaintiffs as Trustees thereof for said sum of $895,200.

G-11. No part of the said $895,200 for which the persons above named in paragraph "G-5" of this complaint are liable and accountable as aforesaid has ever been paid or returned to the Debtor or to plaintiffs as Trustees thereof in restitution or restoration or as compensation for the losses and damages caused to the Debtor or to plaintiffs as its Trustees by the negligent, wasteful, wrongful and illegal acts of said persons as aforesaid.

H-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings with the Debtor with respect to 2,175 shares of the 7% preferred stock of the Debtor, which Williams caused the Debtor to repurchase from two corporations wholly owned by him.

[fol. 81] H-2. Prior to December 31, 1928, the Debtor had authorized, issued and outstanding 75,433 shares of its own 7% preferred stock.

H-3. On December 31, 1928, there were outstanding as obligations of the Debtor in excess of $19,000,000 of its 5% debenture bonds issued on January 1, 1928.

H-4. The Debtor has continued to be and is still obligated and indebted on the above described 5% debenture bonds issued on January 1, 1928, to the extent of $6,300,000 with accrued interest from January 1, 1942.

H-5. At all the dates and times mentioned herein, Williams had full and complete knowledge of the Debtor's financial condition and of the Debtor's obligations to its debentureholders as above set forth.

H-6. On December 31, 1928, Williams caused New Empire and Electric Investment Corporations, his wholly owned corporate instrumentalities, to sell to the Debtor 1,020 and 1,695 shares of the Debtor's 7% preferred stock, respectively, at a total cost to the Debtor of $309,510.

H-7. On December 31, 1928, Williams caused the Debtor to purchase from New Empire and Electric Investment Corporations, his wholly owned corporate instrumentalities,

1,020 and 1,695 shares of the Debtor's own 7% preferred stock respectively, at a cost to the Debtor of $309,510.

II-8. Said sales by New Empire and Electric Investment Corporations caused to be made by Williams for his own benefit to the Debtor were improper, illegal and detrimental to the Debtor's best interests.

II-9. Williams was benefitted and enriched as the result [fol. 82] of the above described unlawful sales of the Debtor's own preferred stock to the Debtor, to the extent of $309,510.

II-10. No part of the said $309,510 has ever been paid or returned to the Debtor or to plaintiffs, as Trustees thereof, in restitution or restoration or as compensation for the losses and damages caused to the Debtor, its stockholders, creditors and debentureholders or plaintiffs as its Trustees, by reason of the above mentioned illegal sales.

II-11. By reason of the aforesaid unlawful sales to the Debtor by Williams, New Empire Corporation and Electric Investment Corporation of 2,715 shares of the Debtor's own preferred stock, the Debtor has been damaged in the sum of $309,510 with interest thereon from the 31st day of December, 1928.

II-12. The Debtor is entitled to recover from Williams, New Empire Corporation and Electric Investment Corporation, in restitution and restoration of the losses and damages caused to it by said defendants' wrongful acts, the sum of $309,510 with appropriate interest thereon.

I-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings with respect to the management contract between the Debtor and New Empire Corporation.

I-2. On the 15th day of February, 1923, the Debtor and New Empire entered into an agreement pursuant to which New Empire agreed, for a consideration of $65,000 per annum, to furnish to the Debtor management and services and undertook the supervision of the operation and financing of the Debtor's business. A copy of this agreement is annexed hereto and marked Exhibit "1(1)" and made a part hereof.

[fol. 83] I-3. Thereafter and on October 1, 1924, the Debtor and New Empire modified the above mentioned management contract, Exhibit "I(1)" annexed hereto, by reducing the payments required to be made by the Debtor to the rate of $18,000 per year. A copy of the said agreement of modification is annexed heerto and marked Exhibit "I(2)" and made a part hereof.

I-4. Pursuant to the terms of the above mentioned management contract, Exhibits "I(1)" and "I(2)" annexed hereto, the contract could be terminated at any time by either of the parties thereto, upon thirty days' written notice to the other, and continued in full force and effect until it was so terminated.

I-5. Williams was at all times familiar with and fully cognizant of the rights of the Debtor as embodied in said management contract as modified, Exhibits "I(1)" and "I(2)" annexed hereto.

I-6. During all of said dates and times mentioned herein Williams was fully cognizant of the Debtor's financial condition and its need for ready cash, as more particularly set forth hereinabove in paragraph "A-23" of this complaint.

I-7. Said management contract continued in full force and effect during the months of January, 1929, through September, 1929, inclusive, and the Debtor made the payments required by said contract, Exhibits "I(1)" and "I(2)" annexed hereto.

I-8. During the months of October or November, 1929, the exact date being unknown to plaintiffs, Williams determined to overreach the Debtor and to make an unconscionable profit at its expense. At the time Williams [fol. 84] reached this decision he was a fiduciary of and for the Debtor and fully cognizant of all its requirements, business conditions and the rights of the Debtor under and pursuant to the above mentioned management contract, Exhibits "I(1)" and "I(2)" annexed hereto.

I-9. Despite Williams' duty as a fiduciary of the Debtor not to impair the interests of the Debtor created by and arising out of said management contract, Exhibits "I(1)" and "I(2)" annexed hereto, and in violation of Williams' fiduciary obligations, Williams, Kilmarx, Glass, Schroeder, Fogarty, Freeman, Narfian, Stone and Ross, conspired

together and agreed and formed the deliberate design and purpose to overreach the Debtor to the extent of $102,328.44, to the sole gain and advantage of Williams.

I-10. The divers acts and things done by Williams, Kilmarx, Glass, Schroeder, Fogarty, Freeman, Narlian, Stone and Ross, hereinabove alleged and as more particularly set forth hereinafter, were all steps in this design and conspiracy in which all of the persons named in this paragraph participated and which were all done for the common purpose of enabling Williams to overreach the Debtor and to make an unconscionable profit at the expense of the Debtor to the extent of $102,328.44.

I-11. The Debtor was entitled under and pursuant to the terms of the above mentioned management contract, Exhibits "I(1)" and "I(2)" annexed hereto, to obtain the services specified in said contract during the months of January, 1929, through September, 1929, inclusive, at a cost to it of $13,500, but for the fraudulent acts of Williams in abusing the trust and confidence of the Debtor in taking advantage of the Debtor and in causing it to appear that the said management contract had been terminated as of De- [fol. 85] cember 31, 1928, and thus enabling Williams to overreach the Debtor and to make an unconscionable profit at its expense to the extent of $102,328.44, pursuant to the plan, scheme and conspiracy more particularly set forth herein.

I-12. The Debtor performed all the terms and conditions on its part to be performed by the management contract with New Empire, Exhibits "I(1)" and "I(2)" annexed hereto, and made all the payments required to be made under said management contract and was entitled to be saved from additional expense, more particularly at a time when the Debtor was hard pressed for ready funds, but for the violations of fiduciary obligations, duties and trusts, and the wrongful acts and conduct of Williams, Kilmarx, Glass, Schroeder, Fogarty, Freeman, Narlian, Stone and Ross as hereinabove and hereinafter set forth.

I-13. Williams, Kilmarx, Glass, Schroeder, Fogarty, Freeman, Narlian, Stone and Ross well knowing the facts and transactions hereinbefore set forth, and the rights and obligations of the Debtor and the parties in and to the premises, planned and determined that in violation of their

fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, creditors and debentureholders, they would so proceed as to enable Williams wrongfully to overreach the Debtor and to enable Williams to take, receive, acquire and retain for himself and for his own benefit an unconscionable profit at the expense of the Debtor to the extent of $102,328.44, and said persons above named in this paragraph, in violation of their fiduciary obligations, duties and trusts, then and there secretly entered into a corrupt, [fol. 86] fraudulent and illegal agreement and conspiracy with each other to do and cause to be done and to accomplish and to cause to be accomplished the aforesaid corrupt, fraudulent and illegal objects and purposes.

I-14. Debtor received no valuable consideration or any consideration or thing of value whatsoever, and none of the persons named in paragraph "I-13" of this complaint paid to the Debtor any consideration at all for said appropriation by Williams of the Debtor's funds and property obtained by Williams through his corporate creature New Empire, at the expense of the Debtor to the extent of $102,328.44.

I-15. Pursuant to and in execution of said corrupt, fraudulent and illegal plan, agreement and conspiracy, and for the accomplishment thereof, Kilmarx, Glass, Schroeder, Fogarty, Freeman, Narlian, Stone, Ross and Williams, did and caused to be done and assisted in the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) Sometime during the months of October and November, 1929, the exact date being now unknown to plaintiffs, they entered into a corrupt, fraudulent and illegal agreement with New Empire to cause the Debtor to pay to New Empire the sum of $86,661.79 and to pay the salary of Stone, as President of the Debtor, for the four months of June, July, August and September, 1929, amounting to the sum of $16,666.65, making a total payment for the benefit of New Empire, and Williams, its sole stockholder, of $102,328.44;

(b) Thereafter and pursuant to said fraudulent, corrupt and illegal agreement, and sometime during [fol. 87] October or November, 1929, they cooperated with Williams so as to cause it to appear that the management contract, Exhibits "I(1)" and "I(2)" annexed hereto, was terminated on December 31, 1928, when in truth the contrary was the fact;

(c) They conspired with Williams to cover up, conceal and hide the real fact, namely, that said management contract was in full force and effect up to and including the end of the month of September, 1929, and instead agreed to act as though said management contract had been terminated at the end of December, 1928;

(d) Accordingly, they directed the officers of the Debtor to pay the salary of Stone, the Debtor's President, for the months of June through September, 1929, and to overpay to New Empire the sum of $85,661.79, acting on the false pretense that said management contract, Exhibits "I(1)" and "I(2)" annexed hereto, had been terminated at the end of December, 1928;

(e) Sometime during the months of October or November, 1929, Williams determined that the management contract, Exhibits "I(1)" and "I(2)" annexed hereto, should be terminated and cancelled. Pursuant to the wishes and demands of Williams and at a meeting of the Board of Directors of the Debtor, held sometime during the months of October and November, 1929, the exact date of which is unknown to plaintiffs, they adopted a resolution based on the assumption that said management contract with New Empire, Exhibits "I(1)" and "I(2)" annexed hereto, had been terminated on December 31, 1928;

[fol. 88] (f) However, it was the purpose of Williams to overreach the Debtor and to make an unconscionable profit at its expense. Accordingly, they caused the books of the Debtor to be altered so as to make it appear that the said management contract, Exhibits "I(1)" and "I(2)" annexed hereto, had been cancelled and terminated at the end of December, 1928, whereas the real fact was that no such termination or cancellation had ever so taken place;

(g) Accordingly, at a meeting of the Executive Committee of the Board of Directors of the Debtor, held sometime during the months of October and November, 1929, the exact date of which is unknown to plaintiffs, Fogarty, Freeman, Kilmarx and Stone, caused pretended proceedings to be taken and pretended minutes to be made purporting to show, first, that the meeting was held on the 8th day of October, 1929, when in truth and in fact it was never held on that day, insofar as the proceedings with respect to the management contract, Exhibits "I(1)" and "I(2)" annexed hereto, were concerned and, secondly, they caused false, fraudulent and improper minutes to be made purporting to show that the said management contract with New Empire, Exhibits "I(1)" and "I(2)", annexed hereto, had actually been terminated prior to January 1, 1929, when in truth and in fact the said management contract had never been so terminated;

(h) They used their positions of trust and responsibility and the powers vested in them by the Debtor to prevent the Debtor from insisting on the fulfillment of the terms and conditions of said management con- [fol. 89] tract, Exhibits "I(1)" and "I(2)" annexed hereto;

(i) They misused the powers entrusted to them by the Debtor and made illegal, corrupt and fraudulent use of their powers for the sole purpose of corruptly enriching Williams and New Empire, his wholly owned corporate creature, all in violation of their fiduciary duties, obligations and trusts as officers, directors, managers, agents and fiduciaries of and for the Debtor;

(j) They used their positions of trust and responsibility and the powers vested in them by the Debtor for Williams' own profit and for the purpose of depriving the Debtor of property and rights lawfully belonging to the Debtor and for the purpose of permitting Williams to overreach the Debtor and make an unconscionable profit at the Debtor's expense, to the extent of $102,328.48.

I-16. Williams and his wholly owned creature, New Empire, have invested and reinvested the said sum of $102,

328.44, and by reason thereof have made and earned large and substantial profits, the exact amounts of which are unknown to plaintiffs at the present time.

I-17. Williams took and received for his own individual use and benefit the said sum of $102,328.44 obtained by New Empire through the overreaching of the Debtor, as more particularly explained hereinabove, and held and now holds the said $102,328.44 and all the profits derived therefrom in trust as the property of the Debtor herein and of plaintiffs, as Trustees of the Debtor.

I-18. By reason of the premises each of the persons named herein as participants has become and is now liable [fol. 90] to account to the Debtor and to plaintiffs as Trustees thereof, as aforesaid, for the sum of $102,328.44, received by Williams and his wholly owned creature, New Empire, through the overreaching of the Debtor as more particularly described hereinabove.

I-19. No part of the said sum of $102,328.44 for which said persons are liable and accountable, as aforesaid, has ever been paid or returned to the Debtor or to plaintiffs as Trustees thereof, in restitution or restoration, or as compensation for the losses and damages caused to the Debtor, or to plaintiffs as its Trustees, by the corrupt, fraudulent and illegal acts of said defendants as aforesaid.

J-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings with respect to 375,000 shares of the preferred stock of Shenandoah which Williams caused the Debtor to sell to Shenandoah, now to be related by plaintiffs.

J-2. Shenandoah suffered large losses by reason of the depreciation after October 29, 1929, in the market value of securities owned by it. By the early part of December, 1929, the surplus of Shenandoah was decreased by an amount in excess of $37,000,000 as a result of said depreciation in the market values of securities owned by Shenandoah.

J-3. In or about the month of December, 1929, Williams conceived the idea of restoring the depreciated surplus of Shenandoah at the expense of the Debtor.

J-4. At the time Williams came to this determination, he was the majority stockholder of the Debtor and had assumed

all the duties, responsibilities and liabilities of a managing [fol. 91] fiduciary of and for the Debtor; at the same time, he was a director of Shenandoah and acted throughout the consummation of the plan about to be related as the agent of Shenandoah and the Debtor.

J-5. The essence of the plan whereby Williams determined to restore the depreciated surplus of Shenandoah at the expense of the Debtor lay in the sale by the Debtor to Shenandoah of 375,000 shares of the preferred stock of Shenandoah at a price which was only one-half of its real intrinsic value.

J-6. At the time that Williams decided to effect this plan, the Debtor was the owner of 375,000 shares of the preferred stock of Shenandoah. Said stock had a par value of $50. per share which was fully covered by the assets of Shenandoah.

J-7. Shenandoah owned, during the dates and times herein involved, 234,375 shares of the common stock of Goldman Sachs Trading Corporation, which had a market value of $9,375,000 on December 4, 1929.

J-8. The plan of Williams was to cause the Debtor to sell its 375,000 shares of the preferred stock of Shenandoah to Shenandoah in return for 234,375 shares of the common stock of Goldman Sachs Trading Corporation. It was Williams' plan to cause Shenandoah's surplus which had theretofore depreciated because of the decrease in the market value of its securities, as above mentioned, to be restored in the amount of $9,375,000 at the expense of the Debtor by reason of the exchange of the Debtor's 375,000 shares of the preferred stock of Shenandoah which was worth at that time at least $18,750,000 for the 234,375 shares of the common stock of Goldman Sachs Trading Corporation which was worth $9,375,000.

[fol. 92] J-9. Pursuant to Williams' plan as above outlined the Debtor and Shenandoah agreed on December 4, 1929, to exchange the 375,000 shares of the preferred stock of Shenandoah owned by the Debtor for the 234,375 shares of the common stock of Goldman Sachs Trading Corporation owned by Shenandoah.

J-10. On the 4th day of December, 1929, Williams caused the Boards of Directors of the Debtor and Shenandoah to ratify and approve the said exchange of securities.

J-11. Williams knew, at the time that he caused the Debtor and Shenandoah to execute the above-described exchange of securities, that the 375,000 shares of preferred stock of Shenandoah owned by the Debtor had an intrinsic value of at least $50. per share amounting in total to the sum of $18,750,000.

J-12. Williams was at all times familiar with and fully cognizant of the Debtor's obligations then existing to its creditors, debentureholders and stockholders, and was fully cognizant of the Debtor's financial condition and its need for ready cash, as more particularly set forth hereinabove in paragraph "A-23" of this complaint.

J-13. By reason of the facts set forth hereinabove, it was the duty of Williams to further the interests of the Debtor and to refrain from causing it to make the above-described exchange at a loss to the Debtor of $9,375,000.

J-14. Despite Williams' duty as a fiduciary of the Debtor, Williams, Kilmarx, Glass, Fogarty, Freeman, Narlian, Schroeder, Stone and Ross conspired together and agreed and formed the deliberate design and purpose to make the above-described exchange of securities, to the sole gain [fol. 93] and advantage of Shenandoah and to the Debtor's loss in the sum of $9,375,000.

J-15. The divers acts and things done by Williams, Kilmarx, Glass, Fogarty, Freeman, Narlian, Schroeder, Stone and Ross as hereinabove alleged and as more particularly set forth hereinafter, were all steps in this design and conspiracy in which all of the persons named in this paragraph participated and which were all done for the common purpose of causing a loss to the Debtor and an equivalent gain to Shenandoah amounting to the sum of $9,375,000, and thus to enable Shenandoah to restore its depreciated surplus by the amount of $9,375,000. Debtor would have been spared the amount of said loss but for the fraudulent acts of Williams, Kilmarx, Glass, Fogarty, Freeman, Narlian, Schroeder, Stone and Ross in abusing the trust and confidence of the Debtor in taking advantage of the Debtor and in causing the Debtor to exchange 375,000 shares of the preferred stock

of Shenandoah for 234,375 shares of the common stock of Goldman Sachs Trading Corporation at a price which was grossly unfair to the Debtor.

J-16. Debtor would have been spared the said loss in the amount of $9,375,000 but for the violations of fiduciary obligations, duties and trusts and the wrongful acts and conduct of Williams in overreaching the Debtor and in causing it to make the above-described unconscionable exchange of securities.

J-17. Williams, Kilmarx, Glass, Fogarty, Freeman, Narlian, Schroeder, Stone and Ross, well-knowing the facts and transactions hereinbefore set forth and the rights and obligations of the Debtor, and being particularly aware of the fact that the Debtor already suffered grievous harm at the [fol. 94] expense of Williams, planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor, its then existing and subsequently created stockholders, creditors and debentureholders, they would so proceed as to enable Williams wrongfully to consummate his unconscionable plan, scheme and agreement to the Debtor's harm and for the benefit of Shenandoah and for the accomplishment of Williams' wrongful and corrupt purposes, and said persons above-named in this paragraph, in violation of their fiduciary obligations, duties and trusts, then and there secretly entered into a wrongful, corrupt and fraudulent agreement and conspiracy with each other to do and cause to be done and to accomplish and to cause to be accomplished the aforesaid wrongful, corrupt and fraudulent objects and purposes, and Williams, Stone, Catchings, Weinberg and Dulles became parties to and acted in said plan, agreement and conspiracy as herein set forth, and the acts and things in this complaint complained of were done by said persons named in this paragraph in aid and in execution of said plan, agreement and conspiracy and said corrupt, fraudulent and illegal objects and purposes.

J-18. Pursuant to said corrupt, fraudulent and illegal plan, agreement and conspiracy, Williams did in fact procure Kilmarx, Glass, Fogarty, Freeman, Narlian, Schroeder, Stone and Ross, in violation of their duties, trusts and obligations to the Debtor, to agree on behalf of the Debtor with Shenandoah to exchange 375,000 shares of the pre-

ferred stock of Shenandoah owned by the Debtor for 234,375 shares of the common stock of Goldman Sachs Trading Corporation owned by Shenandoah, to the Debtor's harm and loss of $9,375,000, and the equivalent benefit thereof to Shenandoah, and said persons named in this paragraph [fol. 95] did in fact corruptly, fraudulently and illegally cause said exchange of securities to be effectuated in the consummation of Williams' fraudulent and corrupt purposes, and did in fact permit Williams to effectuate such purposes at the expense of the Debtor and for the sole benefit of Shenandoah in the amount of $9,375,000.

J-19. The Debtor received no valuable consideration nor any consideration or thing of value whatsoever and none of the persons named in paragraph "J-17" of this complaint paid to the Debtor any consideration at all for said appropriation by Williams of Debtor's said property to the extent of $9,375,000 to Shenandoah.

J-20. Pursuant to and in execution of said corrupt, fraudulent and illegal plan, agreement and conspiracy, and for the accomplishment thereof, Kilmarx, Glass, Fogarty, Freeman, Narlian, Schroeder, Stone, Ross and Williams did and caused to be done and assisted in the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) On December 4, 1929, they entered into a corrupt, fraudulent and illegal agreement with Shenandoah to exchange 375,000 shares of the preferred stock of Shenandoah owned by the Debtor for 234,375 shares of the common stock of Goldman Sachs Trading Corporation owned by Shenandoah;

(b) Thereafter and pursuant to said fraudulent, corrupt and illegal agreement and conspiracy, and on the 6th day of December, 1929, they caused the Debtor to deliver 375,000 shares of the preferred stock of Shenandoah to Shenandoah and to receive therefor from Shenandoah 234,375 shares of the common stock of Goldman Sachs Trading Corporation;

[fol. 96] (c) They misused the powers entrusted to them by the Debtor and made illegal, corrupt and fraudulent use of their powers for the sole purpose of corruptly effectuating the purposes of Williams and

to enrich Shenandoah in the amount of $9,375,000, all in violation of their fiduciary duties, obligations and trusts as officers, directors, managers, agents and fiduciaries of and for the Debtor;

(d) They used their positions of trust and responsibility and the powers vested in them by the Debtor for the purpose of enabling Williams to overreach the Debtor and to permit Shenandoah to make an unconscionable profit at the expense of the Debtor in the amount of $9,375,000;

(e) They made no effort to interfere with Williams' corrupt, fraudulent and wrongful plan and conspiracy to cause the Debtor the above-mentioned loss of $9,375,000;

(f) They actively assisted Williams in the effectuation of his corrupt and fraudulent plan and purposes.

J-21. Pursuant to and in execution of said corrupt, fraudulent and illegal plan, agreement and conspiracy and for the accomplishment thereof, Catchings, Weinberg, Stone, Williams and Dulles, with full knowledge that Williams was acting contrary to the interests of the Debtor and was overreaching the Debtor and permitting Shenandoah to make an unconscionable profit at the Debtor's expense in the amount of $9,375,000, assisted Williams in the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) On the 4th day of December, 1929, they caused Shenandoah to execute an agreement with the intent [fol. 97] and for the purpose of permitting Williams to overreach the Debtor in the amount of $9,375,000 for the sole purpose of enriching Shenandoah in that amount;

(b) They caused Shenandoah to deliver 234,375 shares of the common stock of Goldman Sachs Trading Corporation to the Debtor in exchange for 375,000 shares of the preferred stock of Shenandoah owned by the Debtor when in fact they knew or should have known or were put on inquiry of facts which should have caused them to believe and to know that said exchange would result in the perpetration and effectua-

tion of a fraud on the Debtor, and would cause it loss in the amount of $9,375,000;

(c) They made no effort to interfere with Williams' corrupt, fraudulent, and illegal plan and conspiracy to cause the Debtor said loss of $9,375,000;

(d) Knowing that Williams was violating his fiduciary obligations to the Debtor, they nevertheless participated in said violations and assisted Williams in carrying out his unlawful plan, corrupt agreement and conspiracy, by permitting the above described exchange of securities to the Debtor's loss of $9,375,000 and the equivalent gain to Shenandoah;

(e) They caused the above described exchange of securities to be effectuated when in fact they knew or should have known, or were put on inquiry of the facts which should have caused them to believe and to know that said exchange was made solely in the interests of a corrupt plan then being worked out by Williams;

(f) They knew that the purported exchange of securities above described made between Shenandoah [fol. 98] and the Debtor was a sham, a fraud and a device whereby Williams accomplished his corrupt plan and unlawful conspiracy to cause a loss to the Debtor in the amount of $9,375,000, and a benefit to Shenandoah in an equivalent amount.

J-22. By reason of the premises each of the persons named as participants in this transaction has become and is now liable to account to the Debtor and to plaintiffs as Trustees thereof as aforesaid for the sum of $9,375,000.

J-23. No part of said $9,375,000 for which each of the persons named as participants herein is liable and accountable as aforesaid has ever been paid or returned to the Debtor or to plaintiffs as Trustees thereof in restitution or restoration or as compensation for the losses and damages caused to the Debtor or to plaintiffs as its Trustees by the corrupt, fraudulent, and illegal acts as aforesaid.

K-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by dealings which he caused the Debtor to undertake with respect to

Ashland Securities Corporation (hereinafter referred to as "Ashland") now to be related by plaintiffs.

K-2. In March, 1922, the Debtor was the owner and holder of 72,934 shares of the common stock of Cleveland Electric Illuminating Co., and was entitled to subscribe to 36,467 additional shares for $100. per share.

K-3. Prior to March 24, 1922, Williams was chairman of the board of the Debtor and chairman of the board of North American Company.

K-4. At all the dates and times mentioned herein and more particularly during the months of March and April, 1922, Dillon Read & Company (hereinafter referred to as [fol. 99] "Dillon Read") was a copartnership doing business as bankers and dealers in securities, and maintained an office in the City, County and State of New York.

K-5. Prior to March 24, 1922, defendant Clarence F. Dillon (hereinafter referred to as "Dillon"), was a director of North American Company and a partner in the firm of Dillon Read & Company.

K-6. North American Company was anxious to obtain and purchase the 72,934 shares of Cleveland Electric stock owned by the Debtor and the 34,467 additional shares of Cleveland Electric stock which the Debtor was entitled to obtain by the exercise of the subscription rights more particularly described in paragraph "K-2" above.

K-7. In or about the month of March, 1922, Williams and Dillon conceived the idea of forming a corporation for the purpose of purchasing the Cleveland Electric Illuminating stock from the Debtor and selling the said stock to North American Company at a profit. Accordingly, they worked out the following plan:

(a) Dillon Read caused to be organized Ashland, the capital stock of which was entirely owned by Eastern Corporation, the capital stock of which in turn was entirely owned by the members of the firm of Dillon Read and their families;

(b) Ashland induced North American Company to organize a subsidiary to be known as North American Edison Company for the purpose of purchasing from Ashland the Cleveland Electric Illuminating stock after

Ashland had acquired the said stock from the Debtor. A copy of Ashland's offer to North American Company is annexed hereto and marked Exhibit "K(1)";

[fol. 100] (c) Thereafter and upon the organization of North American Edison Company, Ashland simultaneously offered to purchase 109,401 shares of the common stock of Cleveland Electric Illuminating Company owned and to be acquired by the Debtor, at a price of $10,810,200 in cash and $3,000,000 par amount of preferred stock of North American Company, and to sell the same shares to North American Edison Company at a price of $11,540,000 in cash, together with $3,000,000 par amount of preferred stock of North American Company. The offering letters from Ashland to North American Edison and to the Debtor are annexed hereto and marked Exhibits "K(2)" and "K(3)";

(d) In order to place North American Edison Company in funds necessary to finance the purchase of the Cleveland Electric Illuminating Company stock from the Debtor, Ashland offered to buy from North American Edison Company $14,000,000 face amount of the bonds of North American Company, for the sum of $12,049,000;

(e) Dillon, Read sold the bonds by North American Edison Company to the public and realized thereon a gross profit of $910,000;

(f) As a result of the purchase by Ashland of the Debtor's Cleveland Electric Illuminating stock and Ashland's simultaneous sale of said stock to North American Edison Company, Ashland realized a profit of $729,800.

K-8. Williams acted as the agent of the Debtor in connection with the making of the arrangements for the sale of the Debtor's Cleveland Electric Illuminating stock to Ashland.

[fol. 101] K-9. Williams and Dillon knew at the time of the execution of the aforedescribed plan and transaction that the Debtor was fully able to sell and deliver the Cleveland Electric Illuminating Company stock which it owned and

which it was about to acquire to North American Company or any subsidiary thereof, and that the Debtor could do so directly without the intervention of Ashland.

K-10. During all said dates and times Williams and Dillon were fiduciaries of and for the Debtor.

K-11. Prior to the sale by the Debtor of its Cleveland Electric Illuminating Company stock, Williams determined that he would prevent the Debtor from selling the said stock directly to North American Company, or one of its subsidiaries, and Williams and Dillon determined that they, for their own use and benefit and for the use and benefit of the members of the firm of Dillon Read, would deprive the Debtor of the benefit of such sale to the extent of $729,800.

K-12. By reason of the facts set forth hereinabove, it was the duty of Williams and Dillon to further the interests of the Debtor and to refrain from interfering with its right to sell its Cleveland Electric Illuminating Company stock directly to North American Company or one of North American Company's subsidiaries.

K-13. Despite the duty of Williams and Dillon, as fiduciaries of the Debtor, to further the interests of the Debtor and in violation of their fiduciary obligation, they conspired together and agreed and formed the deliberate design and purpose to overreach the Debtor and to enable Ashland to make an unconscionable profit at its expense to the extent of $729,800.

[fol. 102] K-14. The divers acts and things done by Williams and Dillon as hereinabove alleged and as more particularly set forth hereinafter, were all steps in this design and conspiracy in which they participated, and which were all done for the common purpose of depriving the Debtor of the full benefit of the purchase price paid by North American Edison Company for the Cleveland Electric Illuminating Company stock sold by the Debtor, and to enable Williams and Dillon, through Ashland, to overreach the Debtor and to make a profit at its expense amounting to the sum of $729,800.

K-15. The Debtor would have been able to realize the additional sum of $729,800 in cash from the sale of the

above-mentioned Cleveland Electric Illuminating stock but for the fraudulent acts of Williams and Dillon in abusing the trust and confidence of the Debtor in taking advantage of the Debtor and in causing the said shares of Cleveland Electric Illuminating Company stock to be sold to Ashland instead of directly to North American Edison Company, thereby enabling Ashland to make an unconscionable profit at the expense of the Debtor in the sum of $729,800.

K-16. The Debtor could and would have been able to sell the stock of Cleveland Electric Illuminating Company which it owned and was about to acquire directly to American Edison Company, to the Debtor's additional gain and profit of $729,800, more particularly at a time when the Debtor was pressed for funds to meet its maturing obligations, but for the violations of the fiduciary obligations, duties and trusts and the wrongful acts of Williams and Dillon, as hereinabove and hereinafter set forth.

[fol. 103] K-17. Williams and Dillon, well knowing the facts and transactions hereinbefore set forth and the rights and obligations of the Debtor and the parties in and to the premises, planned and determined that in violation of their fiduciary obligations, duties and trusts to the Debtor and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, creditors and debentureholders, that they would so proceed as to enable their creature, Ashland, wrongfully to appropriate to its own use and benefit a profit of $729,800 made at the expense of the Debtor and to exclude the Debtor from the right to obtain said profit, and said defendants above named in this paragraph, in violation of their fiduciary obligations, duties and trusts, then and there secretly entered into a corrupt, fraudulent and illegal agreement and conspiracy with each other to do and cause to be done and to accomplish and to cause to be accomplished the aforesaid corrupt, fraudulent and illegal objects and purposes.

K-18. Pursuant to said plan, agreement and conspiracy, Williams and Dillon did in fact fraudulently, corruptly and illegally cause their creature, Ashland, to be interposed between the Debtor, as the seller, and North

American Edison Company, as the buyer, for the sole purpose of making an unconscionable profit at the expense of the Debtor in the amount of $729,800.

K-19. Pursuant to and in execution of the said plan, agreement and conspiracy, and for the accomplishment thereof, Williams and Dillon did and caused to be done and assisted in the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) Sometime during the early part of the year 1922 they caused Ashland to be organized;

[fol. 104] (b) They caused Ashland to make an offer to purchase 109,401 shares of the common stock of Cleveland Electric Illuminating Company owned and to be acquired by the Debtor from the Debtor, at a price of $10,810,200 in cash together with $3,000,000 par amount of North American preferred stock;

(c) Simultaneously, they caused Ashland to make an offer to sell to North American Edison Company the said 109,401 shares of the common stock of Cleveland Electric Illuminating Company for the sum of $11,540,000 in cash together with $3,000,000 par amount of North American preferred stock;

(d) They prevented the Debtor from selling the said 109,401 shares of the common stock of Cleveland Electric Illuminating Company directly to North American Edison Co. for the price described in sub-paragraph "c" above;

(e) They misused their positions of trust for the sole purpose of corruptly enriching the members of the firm of Dillon Read.

K-20. Dillon took and received for his own individual use and benefit a substantial portion of the said sum of $729,800. obtained at the expense of the Debtor by his creature Ashland, and held and now holds the same and all the profits derived therefrom in trust as the property of the Debtor herein and of plaintiffs as Trustees of the Debtor.

K-21. By reason of the premises, Williams and Dillon have become and are now liable to account to the Debtor and to plaintiffs, as Trustees thereof as aforesaid, for [fol. 105] the sum of $729,800 received by Ashland at the expense of the Debtor as aforesaid;

K-22. No part of the said $729,800 for which Williams and Dillon are liable and accountable as aforesaid has ever been paid or returned to the Debtor or to plaintiffs as Trustees thereof in restitution or restoration or as compensation for the losses and damages caused to the said Debtor or to plaintiffs as its Trustees by the corrupt, fraudulent and illegal acts as aforesaid.

L-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings with respect to common stock of North American Company borrowed from the Debtor by Nasco, now to be related by plaintiffs.

L-2. Williams had a personal interest in maintaining the market price of the common stock of North American Company.

L-3. Determined to maintain the price of the common stock of North American Company in which he had a substantial personal interest, Williams caused Nasco to engage in trading operations therein during the years 1926 and 1927.

L-4. In order to enable Nasco to engage in this venture and market operation, Williams caused the Debtor to lend to Nasco 60,000 shares of the common stock of North American Company.

L-5. During the entire time while Nasco was engaged in the above described market operations, Nasco was acting solely and exclusively for the account of and in the personal interest of Williams and not for the account or in the interest of the Debtor.

[fol. 106] L-6. In connection with the above-described market operation and by the end of April, 1927, Nasco sold 80,000 shares of the common stock of North American Company in excess of the amount of such stock which it owned.

L-7. In order to meet its sales commitments made as above set forth, Nasco delivered 40,000 shares of the common stock of North American Company which it had borrowed from the Debtor.

L-8. Williams was unwilling to have Nasco pay to the Debtor the market price for said 40,000 shares of the common stock of North American Company, and accordingly conceived the idea of having it appear that Nasco had been distributing the said 40,000 shares for the account of the Debtor and that to the extent of said 40,000 shares the Debtor had an interest in the venture engaged in by Nasco as above set forth.

L-9. Williams knew at the time of the execution of the above-described plan and transaction that Nasco had not been distributing the said 40,000 shares of the common stock of North American Company for the account of the Debtor.

L-10. During all the said dates and times herein mentioned, Williams was a fiduciary of and for the Debtor.

L-11. By reason of the facts set forth hereinabove, it was the duty of Williams to further the interests of the Debtor and to refrain from interfering with its rights to obtain the full market price for the 40,000 shares of the common stock of North American Company loaned by the Debtor to Nasco, and to refrain from overreaching the Debtor or to permit Nasco to overreach the Debtor and make an unconscionable profit at the Debtor's expense.

[fol. 107] L-12. Despite the duty of Williams as a fiduciary of the Debtor to further the interests of the Debtor and in violation of his fiduciary obligations, Williams, Fogarty, Glass, Kilmarx, Ross and Schroeder, conspired together and agreed and formed the deliberate design and purpose to overreach the Debtor and to permit Williams, through Nasco, his wholly owned corporate instrumentality, to make an unconscionable profit at the Debtor's expense to the extent of the sum of $154,428,80.

L-13. The divers acts and things done by Williams, Fogarty, Glass, Kilmarx, Ross and Schroeder, as hereinabove alleged and as more particularly set forth hereinafter, were all steps in this design and conspiracy in which all of the said persons named in this paragraph participated, and which were all done for the common purpose of depriving the Debtor of the full benefit of the market price of the 40,000 shares of the common stock of North American Company loaned by the Debtor to

Nasco and to enable Williams through Nasco, his wholly owned corporate instrumentality, to overreach the Debtor and make a profit at its expense amounting to the sum of $154,428.80.

L-14. The Debtor would have been able to realize the additional sum of $154,428.80 in cash from the sale of the above-mentioned 40,000 shares of the common stock of North American Company but for the fraudulent acts of Williams, Fogarty, Glass, Kilmarx, Ross and Schroeder in abusing the trust and confidence of the Debtor and in taking advantage of the Debtor by causing it to appear as though the said 40,000 shares of the common stock of North American Company had been distributed by Nasco for the account of the Debtor instead of being sold by the Debtor to Nasco, thereby permitting Williams through Nasco, his wholly owned instrumentality, to overreach the [fol. 108] Debtor and make an unconscionable profit at its expense in the amount of $154,428.80.

L-15. The Debtor could and would have been able to sell the 40,000 shares of the common stock of North American Company which Nasco had borrowed from the Debtor, to the Debtor's additional gain and profit of — least $154,428.80, but for the violations of the fiduciary obligations, duties and trusts and the wrongful acts of Williams, Fogarty, Glass, Kilmarx, Ross and Schroeder, as hereinbefore and hereinafter set forth.

L-16. Williams, Fogarty, Glass, Kilmarx, Ross and Schroeder, well knowing the facts and transactions hereinbefore and hereinafter set forth and the rights and obligations of the Debtor and the parties in and to the premises, planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, creditors and debentureholders, they would so proceed as to enable Williams and his creature, Nasco, wrongfully to overreach the Debtor and to make an unconscionable profit at the Debtor's expense to the extent of $154,428.80, and to exclude the Debtor from the right to obtain said profit, and the persons above named in this paragraph, in violation of their fiduciary obligations, duties and trusts, then and there

secretly entered into a fraudulent, corrupt and illegal agreement and conspiracy with each other to do and cause to be done and to accomplish and to cause to be accomplished the aforesaid fraudulent, corrupt and illegal objects and purposes.

L-17. Pursuant to said plan, agreement and conspiracy, Williams, Fogarty, Glass, Kilmarx, Ross and Schroeder, [fol. 109] did in fact corruptly, fraudulently and illegally permit Williams and Nasco, his wholly owned corporate instrumentality, to overreach the Debtor and to make an unconscionable profit at its expense in the amount of $154,428.80, and the persons named in this paragraph did in fact fraudulently, corruptly and illegally permit Williams and Nasco, his wholly owned corporate instrumentality, to appropriate the unconscionable profit so made to the use of Williams and Nasco.

L-18. Pursuant to and in execution of the said plan, agreement and conspiracy and for the accomplishment thereof, Williams, Fogarty, Glass, Kilmarx, Ross and Schroeder did and caused to be done and assisted in the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) They cooperated with Williams so as to cause it to appear that the venture by Nasco with respect to the market operation in the common stock of North American Company above-described was, to the extent of 40,000 shares, accomplished and done by Nasco as the agent of the Debtor, when in truth the contrary was the fact;

(b) They conspired with Williams to cover up, conceal and hide the real fact, namely, that Nasco had as Williams' own corporate instrumentality and for Williams' own individual account, conducted the market venture and operation in the common stock of North American Company, and instead agreed to act as though Nasco's venture to the extent of 40,000 shares had been conducted for the account of the Debtor;

(c) Accordingly, they directed the officers of the Debtor to make it appear as though the said 40,000 [fol. 110] shares previously loaned to Nasco had actu-

ally been distributed by Nasco for the account of the Debtor, and to act on the false pretense that said shares had not been sold by the Debtor to Nasco;

(d) At a meeting of the Board of Directors of the Debtor held on the 7th day of June, 1927, they caused pretended proceedings to be taken and pretended minutes to be made, purporting to show that Nasco's action in the market operation, in connection with the common stock of North American Company above-described had, to the extent of 40,000 shares, been accomplished and carried out as agent for the Debtor;

(e) Accordingly, said directors at the above-described meeting adopted a purported resolution which was false and fraudulent in fact in the following words and figures, to wit:

"The President reported that the North American Securities Company, through their dealer distribution, had sold during the period to May 21, 1927, in excess of 40,000 shares of the common stock of The North American Company, at an average price of $46.13928 per share, in accordance with statement submitted. The Central States Electric Corporation having advanced stock of The North American Company, also in excess of 40,000 shares since January 21, 1927, against cash deposits, 13,893 shares being from the Company's trading account, and in excess of 26,107 shares from the Company's investment account, and it being necessary to realize on its stock holdings for the Company's corporate purposes, on motion duly made and carried the following resolution was adopted:

[fol. 111] "Resolved, that the Central States Electric Corporation adopt the sale of such 40,000 shares of North American Company common stock, as set forth above, at a net price of $46.13928 per share as its action."

(f) They caused entries to be made on the books of the Debtor so as to show a false condition and one which was not true in fact, namely, that the

market operation conducted by Williams through Nasco had been to the extent of 40,000 shares of the common stock of North American Company accomplished as the agent of and for the account of the Debtor;

(g) They misrepresented to the Debtor's accountants and bookkeepers the true state of facts and affairs for the purpose of inducing said accountants and bookkeepers to make improper entries on the Debtor's books;

(h) By reason of said misrepresentations which they made to the Debtor's accountants and bookkeepers, they caused the accountants and bookkeepers to make entries on the Debtor's books and records which were false, improper and fraudulent, and were designed to conceal the true state of facts;

(i) They made no effort whatsoever and caused the Debtor to refrain from making any effort whatsoever to impede Williams in the carrying out of his unlawful, fraudulent and corrupt conspiracy;

(j) They used their position of trust and responsibility and the powers vested in them by the Debtor to aid and assist Williams in the carrying out of all the details of the above-described fraudulent and corrupt plan;

[fol. 112] (k) They misused the powers entrusted to them by the Debtor and made corrupt, fradulent and illegal use of their said powers for the purpose of corruptly enabling Williams and Nasco to overreach the Debtor and to make an unconscionable profit at its expense to the extent of $154,428.80;

(l) They used their positions of trust and responsibility and the powers vested in them by the Debtor for the benefit of Williams and Nasco, and for the purpose of enabling Williams and Nasco to overreach the Debtor and to make an improper and unconscionable profit at the Debtor's expense, all in violation of their fiduciary duties, obligations and trusts as officers, directors and fiduciaries of and for the Debtor.

L-19. Williams and Nasco were benefited and enriched as the result of the above-described corrupt, fraudulent and illegal plan and conspiracy and the Debtor thereby suffered great loss and harm.

L-20. Williams has invested and reinvested said $154,428.80 and by reason thereof has made and earned large and substantial profits, the exact amounts of which are unknown to plaintiffs at the present time.

L-21. Since the conclusion of the above-described fraudulent plan and corrupt conspiracy, Williams and Nasco have held and now hold the said sum of $154,428.80 and all the profits derived therefrom in trust as the property of the Debtor herein and plaintiffs as said Trustees of the said Debtor.

L-22. No part of the said $154,428.80 for which defendants are accountable and liable as aforesaid, has ever been paid or returned to the Debtor or to plaintiffs as Trustees [fol. 113] thereof, in restitution or restoration, or as compensation for the losses and damages caused to said Debtor or plaintiffs as its Trustees, for the fraudulent, corrupt and illegal acts as aforesaid.

L-23. Debtor is entitled to recover from all the persons who participated in this transaction the sum of $154,428.80 with appropriate interest thereon, and from Williams and Nasco all profits derived therefrom, in restitution and restoration of the losses and damages caused to the Debtor by the above-mentioned corrupt, fraudulent and illegal acts.

M-1. Another transaction wherein Williams violated his fiduciary obligations to the Debtor is shown by his dealings with the Debtor in an attempt to destroy assets of the Debtor, which will now be related by plaintiffs.

M-2. By the end of the year 1929 and by reason of the facts hereinabove set forth, Williams had become indebted and obligated to the Debtor in a sum in excess of $39,000,000, and by the end of the year 1938 Williams had become additionally obligated to the Debtor by reason of the facts set forth in "E-1" to "E-28" of this complaint.

M-3. On and after the accrual of Williams' indebtedness as hereinabove alleged, Williams was at all times fully able to pay the amount thereof to the Debtor.

M-4. After Williams' indebtedness as above alleged had accrued, he determined to avoid and evade the payment and satisfaction of his debts and to destroy assets of the Debtor, and accordingly he embarked upon the plan and course of conduct now to be related.

M-5. At the time Williams came to the decision to evade the payment of his just debts and to destroy assets of the [fol. 114] Debtor, he was a fiduciary of and for the Debtor and its dominant and managing stockholder as more particularly set forth hereinabove.

M-6. Despite Williams' duty as a fiduciary of the Debtor to further the interests of the Debtor and in violation of his fiduciary obligations, Williams, Kilmarx, Ross, Glass, Schroeder, Fogarty, Freeman, Narlian, Stone, Eccles, Sealy, Andersen, Philipp, Finney, Pardee, McCornack, Smith, Johnson and Baker conspired together and agreed and formed the deliberate design, plan and purpose to conceal Williams' obligations to the Debtor, to aid and abet Williams in avoiding and evading payment of his obligations to the Debtor, and to destroy the indebtedness of Williams to the Debtor as an asset of the Debtor by preventing the institution of any suits for the recovery of such assets within the statutory period of limitations, and for such period as to enable Williams to plead defenses of limitations and laches in the event suits were instituted against him.

M-7. The divers acts and things done by Williams, Kilmarx, Ross, Glass, Schroeder, Fogarty, Freeman, Narlian, Stone, Eccles, Sealy, Andersen, Philipp, Finney, Pardee, McCornack, Smith, Johnson and Baker as hereinabove alleged and as more particularly set forth hereinafter were all steps in this design and conspiracy in which all of the persons named in this paragraph participated, and which were all done for the common purpose of aiding and abetting Williams in evading his just obligations and debts to the Debtor, and of enabling Williams to destroy assets of the Debtor.

M-8. Accordingly, Williams, Kilmarx, Ross, Glass, Schroeder, Fogarty, Freeman, Narlian, Stone, Eccles, Sealey, Andersen, Philipp, Finney, Pardee, McCornack, Smith, Johnson and Baker, well knowing the facts and trans-

[fol. 115] actions hereinbefore set forth and the rights and obligations of the parties in and to the premises, planned and determined that in violation of their fiduciary obligations, duties and trusts as fiduciaries, directors, officers and agents of the Debtor, and in violation of the rights of the Debtor, its then existing and subsequently created stockholders, debentureholders and creditors, they would so proceed as to enable Williams fraudulently, corruptly and illegally to evade and avoid his just obligations to the Debtor and to destroy assets of the Debtor, all for Williams' own benefit and to the Debtor's consequent harm and loss, and to cause the Debtor to abstain and refrain from instituting any suits against Williams to enforce his just obligations, and said persons above-named in this paragraph, in violation of their fiduciary obligations, duties and trusts, secretly entered into a corrupt, fraudulent and illegal agreement and conspiracy with each other to do and to cause to be done and to accomplish and cause to be accomplished the aforesaid fraudulent, corrupt and illegal objects and purposes, and Williams, Kilmarx, Ross, Glass, Schroeder, Fogarty, Freeman, Narlian, Stone, Eccles, Sealy Anderson, Philipp, Finney, Pardee, McCornack, Smith, Johnson and Baker became parties to and acted in said plan, agreement and conspiracy during all the dates and times mentioned herein as set forth herein, and the acts and things herein complained of were done by the said persons above-named in this paragraph in aid and in execution of said plan, agreement and conspiracy and for the accomplishment thereof, and said persons above-named did and caused to be done and assisted in the doing of the acts and things hereinbefore and hereinafter complained of, including among others the following, to wit:

(a) During all the dates and times mentioned herein and up to the 23rd day of February, 1942, they co-operated with Williams by causing the Debtor to re-
[fol. 116] frain from making any attempt to enforce Williams' just obligations through legal process;

(b) During all the dates and times mentioned herein and up to the 23rd day of February, 1942, they connived and conspired with Williams to prevent stockholders or other parties or persons in interest from acquiring any knowledge of Williams' wrongdoing

and of the existence of the aforedescribed indebtedness from Williams to Debtor;

(c) During all the dates and times mentioned herein and up to the 23rd day of February, 1942, they conspired and connived with Williams to cover up, conceal and hide the real facts which had occurred, namely, that Williams was obligated and indebted to the Debtor by reason of the various transactions set forth hereinabove, and so acted as to make it appear that Williams was not obligated to Debtor in any way whatsoever;

(d) Accordingly, they directed the officers of the Debtor to refrain from instituting any suits against Williams;

(e) They caused pretended proceedings to be taken purporting to show that they had examined into one of the causes of action possessed by the Debtor against Williams, and had made an independent decision that there was no claim when in truth and in fact the entire action was a sham and a pretense taken in connivance with Williams and in his interest and pursuant to his instructions and for the sole purpose of concealing and hiding the real facts and of exculpating Williams;

(f) In an endeavor to prevent the control of the [fol. 117] Debtor from falling into the hands of debentureholders of the Debtor or other parties not known to or controlled by Williams, they caused the Debtor to pay interest on the debenture obligations of the Debtor at various times during the years 1931 to 1941 inclusive out of capital of the Debtor;

(g) They caused said payment of interest on debenture obligations of the Debtor to be made out of capital funds of the Debtor at times when they knew that the Debtor's actual earnings were far from sufficient to meet the interest expenses of said debenture obligations and at times when the liabilities of the Debtor exceeded its assets at fair market values;

(h) They determined, in the same endeavor, to keep control of the Debtor in their own hands and in hands friendly to Williams, and not to seek the haven

of the Bankruptcy Court in the interest of all the stockholders, debentureholders and creditors of the Debtor;

(i) Accordingly, and solely in the interest of Williams, they instructed the officers of the Debtor to refrain from filing any petition for reorganization and to pursue the policy of paying interest expense on the debenture obligations of the Debtor out of capital;

(j) They pursued and continued to pursue such acts and conduct and policies in the interest of Williams until the 23rd day of February, 1942, for the purpose of enabling Williams to destroy assets of the Debtor and to obtain the benefits of the statute of limitations and the defense of laches;

(k) They persisted in this conduct in the interest of Williams until advised on or about the 5th day of [fol. 118] February, 1942, by the Director of the Investment Company Division of the Securities and Exchange Commission by letter dated February 4, 1942, that the Division was considering recommending to the Commission that proceedings be instituted under Section 36 of the Investment Company Act of 1940 to enjoin a continued gross abuse of trust by the officers and directors of the Debtor in failing to liquidate or reorganize the Debtor under the circumstances.

M-10. Williams is justly obligated to the Debtor in the amounts set forth in paragraph "M-2" of this complaint, and held and now holds the said sums and all the profits derived therefrom in trust as the property of the Debtor herein and of plaintiffs as Trustees of said Debtor.

M-11. By reason of the premises, each of the persons named as participants herein has become and is now liable to account to the Debtor and to plaintiffs, as Trustees thereof as aforesaid, for the money and property set forth and referred to in paragraph "M-2", of this complaint.

M-12. No part of the said sums set forth in paragraph "M-2" of this complaint, for which Williams and each of the persons named as participants herein are liable and accountable as aforesaid, has ever been paid and returned to the Debtor or to plaintiffs as Trustees thereof,

in restitution or restoration or as compensation for losses and damages caused to the Debtor or to plaintiffs as its Trustees, by the corrupt, fraudulent and illegal acts as aforesaid.

M-13. The Debtor is entitled to recover from Williams the money and property set forth and referred to in paragraph "M-2" of this complaint, with appropriate interest thereon, together with all profits derived therefrom by [fol. 119] Williams, in restitution and restoration of the losses and damages caused to the Debtor by Williams' fraudulent, corrupt and illegal acts, and plaintiffs and the Debtor stand ready to treat and consider Williams, or whichever one of his wholly-owned corporate instrumentalities may be entitled thereto, as the owner and holder of 96,154 shares of the Debtor's common stock; 22,747 shares of the Debtor's convertible preferred stock of 1928; 28,432 shares of the Debtor's convertible preferred stock of 1929, and 2,715 shares of the Debtor's 7% preferred stock, and to deliver and return to Williams the foregoing shares of stock in addition to 68.423 shares of the common stock of North American Company, 70,195.979 shares of American Cities "B" stock and 15,600 shares of Electric Shareholdings common stock, together with all dividends and benefits accrued and accruing or incident to the ownership of the above-described stocks, from the respective dates appropriate thereto and more particularly set forth hereinabove in this complaint, including any and all rights accrued or accruing or pertaining to the above-described shares of the Debtor's common and preferred stocks by reason of any reorganization plan or agreement made or to be made in the reorganization proceeding above described and mentioned in paragraph "A-2" of this complaint, subject to any adjustments, liens or accountings required to be made in equity and good conscience.

N-1. Plaintiffs have no adequate remedy at law to which they are entitled and cannot secure full and adequate relief save in a court of equity where matters of this and similar nature are cognizable and relievable.

Wherefore, plaintiffs pray this Court adjudge and decree that:

1. The defendants conspired to waste, destroy, mis-
[fol. 120] appropriate, unlawfully acquire, convert and

otherwise wrongfully deal with the property and assets belonging to the Debtor or to which the Debtor was entitled, all as more particularly set forth in the complaint herein;

2. In the course and in the execution of the said conspiracy or conspiracies, defendants were guilty of breaches of trust with respect to the Debtor, waste of assets of the Debtor, and unlawful taking and disposition of the Debtor's property, or property to which the Debtor was entitled, all as more particularly set forth in the complaint herein;

3. The defendants and each of them have become and are now liable to account to the Debtor, and to plaintiffs as Trustees thereof, as aforesaid, for moneys and property received by defendants or any of them, for all losses to said Debtor or to plaintiffs, as its Trustees, and for all profits made or received by defendants, or any of them, as the result of the wrongful acts and breaches of trust of defendants, or any of them, all as more particularly set forth in the complaint herein;

4. Such adjustments be made as between plaintiffs and the defendants, or between and amongst the defendants as may be required by equity and good conscience;

5. Plaintiffs have such orders, decrees and process, interlocutory as well as final, as may be necessary or appropriate to enforce the relief to which plaintiffs are entitled;

6. Plaintiffs have such other and further relief as may be just and proper;

[fol. 121] 7. Plaintiffs recover from defendants the costs and disbursements of this action.

Austrian & Lance, by Carl J. Austrian, Attorneys for Plaintiffs, Office and P. O. Address, 61 Broadway, Borough of Manhattan, New York City.

SCHEDULE "A"

Name	Period of Incumbency as Director of Central States Electric Corporation
Harrison Williams	From June 10, 1912 to March 22, 1922
Louis E. Kilmarx	" March 22, 1922 to date
Walter C. Ross	" March 4, 1930 to August 8, 1932
Reuben E. Glass	" March 6, 1923 to August 8, 1932
Charles Ward Schroeder	" March 2, 1926 to April 6, 1937
James F. Fogarty	" January 6, 1926 to January 30, 1934
Herbert C. Freeman	" March 6, 1928 to December 28, 1934
Constantine A. H. Narlian	" March 5, 1929 to September 27, 1934
Clifford F. Stone	" May 28, 1929 to September 27, 1934
John H. Eccles	" January 30, 1934 to October 31, 1941
Robert Sealy	" April 4, 1933, to December 28, 1934
Harold A. Andersen	" September 27, 1934 to May 31, 1938 and January 10, 1940 to October 31, 1941
Otto A. Philipp	" September 27, 1934 to April 7, 1936
Clinton M. Finney	" December 28, 1934 to October 31, 1939
Albert E. Pardee	" April 7, 1936 to December 7, 1937
David G. McCornack	" December 7, 1937 to date
R. Gilman Smith	" May 31, 1938 to January 10, 1940
Christian A. Johnson	" April 5, 1938 to date
Hugh B. Baker	" January 10, 1940 to October 31, 1941

[fol. 122]

SCHEDULE "B"

Name	Period of Incumbency as Officer of Central States Electric Corporation
Harrison Williams	Chairman of Board of Directors from March 6, 1917 to March 22, 1922.
Louis E. Kilmarx	Assistant Secretary from December 2, 1919 to December 7, 1920; Assistant Treasurer from December 2, 1919 to December 7, 1920; Secretary from December 7, 1920 to March 1, 1921; Treasurer from December 7, 1920 to date; Assistant Secretary from March 8, 1922 to December 5, 1922; Secretary from December 5, 1922 to February 26, 1923; President from March 6, 1923 to July 3, 1929; and Vice-President from July 3, 1929 to date.

Name	Period of Incumbency as Director of Central States Electric Corporation
Walter C. Ross	Assistant Secretary from December 7, 1920 to March 1, 1921; Assistant Treasurer from December 7, 1920 to August 8, 1932; and Assistant Secretary from March 6, 1923 to August 8, 1932.
Reuben E. Glass	Vice-President from November 6, 1922 to August 8, 1932; and Secretary from March 6, 1923 to August 8, 1932.
Charles Ward Schroeder	Vice-President from March 2, 1926 to March 5, 1929, and from April 29, 1932 to May 5, 1933.
Constantine A. H. Narlian	Vice-President from March 5, 1929 to September 27, 1934, and Secretary from August 8, 1932 to September 27, 1934.
Clifford F. Stone	President from July 3, 1929 to September 27, 1934.
John H. Eccles	Assistant Secretary from August 8, 1932 to September 27, 1934; Assistant Treasurer from August 8, 1932 to date; and Secretary from September 27, 1934 to date.
[fol. 123]	
Harold A. Andersen	Vice-President from September 27, 1934 to date, and Assistant Secretary from September 27, 1934 to date.
R. Gilman Smith	President from May 31, 1938 to December 23, 1938.
Christian A. Johnson	President from December 23, 1938 to date.

SCHEDULE "C"

NAME	Period of Incumbency as Member of Executive Committee of Central States Electric Corporation
Louis E. Kilmarx	September 5, 1922 to April 3, 1934
James F. Fogarty	March 2, 1926 to January 30, 1934
Charles Ward Schroeder	March 2, 1926 to March 6, 1928
Herbert C. Freeman	March 6, 1928 to April 4, 1933
Clifford F. Stone	May 28, 1929 to April 3, 1932
Constantine A. H. Narlian	April 4, 1933 to April 3, 1934

[fol. 124] EXHIBIT "A (1)"

Agreement dated this 23rd day of July, 1929, between Central States Electric Corporation, a Virginia corporation (hereinafter called "Central States"), party of the first part; The Goldman Sachs Trading Corporation, a Delaware corporation (hereinafter called "Trading"), party of the second part, and Goldman, Sachs & Co., a copartnership having its principal place of business in the City of New York, N. Y. (hereinafter called the "Bankers"), parties of the third part, and Shenandoah Corporation, a Delaware corporation (hereinafter called the "New Company"), party of the fourth part,

The parties hereto hereby agree together as follows:

First: Central States and Trading have caused the New Company to be formed under the laws of Delaware, bearing the name "Shenandoah Corporation", with an authorized capital stock of 5,000,000 shares of serial preference stock of the par value of $50 per share and 15,000,000 shares of common stock without par value. The certificate of incorporation and by-laws of the New Company are in form of Annex A and B hereto respectively; and only such changes shall be made therein prior to the time of delivery of the preference stock and common stock hereunder as the parties hereto may agree upon. The initial issue of serial preference stock of the New Company shall consist of 1,000,000 shares of Optional 6% Convertible Preference Stock, Series of 1929 (hereinafter called the "Preference stock"), the terms of which shall be substantially as set forth in Annex A hereto with only such changes made therein prior to the time of delivery of the preference stock hereunder as the parties hereto may agree upon.

[fol. 125] Second: The New Company will issue and sell to purchasers to be found by Goldman, Sachs & Co., and Goldman, Sach & Co. agrees to find such purchasers, 1,000,000 full-paid and non-assessable shares of its common stock at the price of $12.50 per share.

Third: If Goldman, Sachs & Co. shall so request Central States and Trading shall each loan to Goldman, Sachs & Co. for the purpose of taking up and paying for said 1,000,000 shares of common stock the sum of $6,250,000 without interest, said sum to be repaid to Central States

and Trading on August 7, 1929 contemporaneously with the delivery of 1,000,000 shares of preference stock and 4,000,000 shares of common stock as hereinafter set forth. If for any reason the transactions set forth in this contract should not be consummated Goldman, Sachs & Co. shall have the right to "put" all or any part of 1,000,000 shares of such common stock in equal proportions to Central States and Trading at the price of $12.50 per share and Central States and Trading shall each reimburse Goldman, Sachs & Co. for the cost of any transfer stamps in connection therewith.

Fourth: Central States will issue or cause to be delivered to the New Company in such names as it may specify 480,770 full-paid and non-assessable shares of the common stock of Central States, as such shares shall be constituted after giving effect to the 200% stock dividend payable July 25, 1929 of which at least 384,616 shares shall be of original issue and shall pay to the New Company $20,000,000 in cash, together with a sum in cash equal to the accrued dividend on the 500,000 shares of preference stock hereinafter mentioned; Trading will issue and deliver to the New Company in such names as it may specify 238,096 full-paid and non-assessable shares of the capital stock of Trading, all of which shall be of original [fol. 126] issue, and shall pay to the New Company the sum of $20,000,000 in cash, together with a sum in cash equal to the accrued dividend on the 500,000 shares of preference stock hereinafter mentioned.

Of the consideration to be received by the New Company for the 5,000,000 shares of its common stock the Board of Directors at the time of the issue thereof shall determine and fix $25,000,000 of such consideration as capital and the balance of such consideration shall be surplus.

Fifth: The New Company will issue to Central States 500,000 full-paid and non-assessable shares of its preference stock and 2,000,000 full-paid and non-assessable shares of its common stock and will issue and deliver to Trading 500,000 full-paid and non-assessable shares of its preference stock and 2,000,000 full-paid and non-assessable shares of its common stock.

Sixth: Delivery of the 1,000,000 full-paid and non-assessable shares of the common stock to the purchasers

found by Goldman, Sachs & Co., or to Goldman, Sachs & Co., for the account of the purchasers found or to be found by them shall be made in the name of Goldman, Sachs & Co. in such denominations as Goldman, Sachs & Co. may designate against payment by or for the account of such purchasers to the New Company for said shares in current New York funds, at the office of Goldman, Sachs & Co., No. 30 Pine Street, New York, N. Y., at 3:00 o'clock P. M., Eastern Daylight Saving Time on July 26, 1929 or on such other date as may be agreed upon in writing between the parties hereto.

Seventh: Delivery by the New Company shall be made to Central States of the 500,000 full-paid and non-assessable shares of its preference stock, in the name of Gold- [fol. 127] man, Sachs & Co., and of the 2,000,000 full-paid and non-assessable shares of its common stock, in such names and denominations as Central States may specify, and delivery shall be made by the New Company to Trading of the 500,000 full-paid and non-assessable shares of its preference stock in the name of Goldman, Sachs & Co. and of the 2,000,000 full-paid and non-assessable shares of its common stock, in such names and denominations as Trading may specify against the delivery to the New Company by Central States and Trading, respectively, of the securities and cash as hereinabove set forth, at the office of Goldman, Sachs & Co., No. 30 Pine Street, New York, N. Y., at 10:00 o'clock A. M. Eastern Daylight Saving Time, on August 7, 1929 or on such other date as may be agreed upon in writing between the parties hereto.

The certificates representing the 96,154 shares of the common stock of Central States not of original issue to be delivered by Central States to the New Company shall be in transferable form as required by New York Curb Exchange delivery and with all signatures guaranteed by a New York bank or Curb or Stock Exchange house satisfactory to the New Company. Central States will immediately provide the New Company with funds necessary to cover the cost of all stock transfer stamps required in connection with the transfer thereof.

Eighth: Trading and Central States will each sell the 500,000 shares of the preference stock of the New Company to be received by them to purchasers to be found by a syndicate (hereinafter referred to as the "Syndicate")

at the price of $50 per share and accrued dividends. Goldman, Sachs & Co. will endeavor to form such a syndicate and prior to the public offering of preference stock and common stock Goldman, Sachs & Co. will deliver written notice to Central States and Trading as to whether or not [fol. 128] it has been successful in its endeavors to form such syndicate. In case of the formation of the syndicate as set forth in such notice Goldman, Sachs & Co. will cause to be delivered to Central States and Trading, together with such notice a written acceptance by the syndicate of its obligation to find purchasers for said 1,000,000 shares of preference stock as herein provided, or to take up and pay for on the delivery date any and all of said shares for which it may not have been able to find purchasers.

Ninth: Delivery by Central States and Trading of the certificates representing said 1,000,000 shares of preference stock issued in the name of Goldman, Sachs & Co. shall be made to Goldman, Sachs & Co. as syndicate managers for the account of the purchasers found or to be found by the syndicate, in such denominations as the syndicate may request, accompanied by New York and Federal stock transfer stamps, at the office of Goldman, Sachs & Co., No. 30 Pine Street, New York, N. Y., at 10:00 o'clock A. M., Eastern Daylight Saving Time, on August 7, 1929. Goldman, Sachs & Co. will cause Central States and Trading to be reimbursed for the cost of such transfer stamps.

Tenth: Prior to the termination of any syndicate and or selling group formed by Goldman, Sachs & Co. in connection with their marketing of 1,000,000 shares of preference stock and 1,000,000 shares of common stock, Goldman, Sachs & Co. shall have the right to give notice to Central States and Trading that it intends to "put" in equal amounts to Central States and Trading all or any part of 200,000 shares of the preference stock at the price of $50 per share plus accrued dividends, less with respect to each of such shares so "put" any selling group commission per share allowed by the syndicate to the mem- [fol. 129] bers of any selling group formed in connection with the marketing of such shares. Goldman, Sachs & Co. shall deliver and Central States and Trading shall take up and pay for the shares so "put" within five days after the termination of any such syndicate or selling group. Gold-

man, Sachs & Co. shall pay in equal amounts to Central States and Trading, in the event such "put" is made, that proportion of the originating net profits of Goldman, Sachs & Co. after deducting all expenses incurred in connection with this contract or the marketing of such shares, including losses of any trading accounts in connection with such marketing (but exclusive of any profits or commissions made by Goldman, Sachs & Co. as a member of any syndicate or selling group formed by it in connection herewith and any sums payable to or for the account of the New Company for any reason whatsoever) as the par value of the preference shares so "put" shall bear to $67,500,000. Goldman, Sachs & Co.'s statement of such originating net profits shall be final, conclusive and binding upon all parties.

Eleventh: The validity and legality of all things done pursuant to this agreement as well as the form and substance of all papers and documents used in connection with the performance of this agreement, shall be subject to the approval of Messrs. Sullivan & Cromwell; and each of the parties hereto shall cause them to be furnished with all papers and information which may be reasonably requested in this connection. Contemporaneously with each delivery and payment hereunder, each of the parties hereto and the syndicate shall receive from Messrs. Sullivan & Cromwell their written opinion passing favorably upon all legal phases of the situation.

[fol. 130] Twelfth: Goldman, Sachs & Co. or the syndicate may offer and sell the 1,000,000 shares of preference stock and 1,000,000 shares of common stock at its election on a "when issued" and/or "when delivered" basis or otherwise; and prior thereto the president or other appropriate officer of the New Company shall furnish Goldman, Sachs & Co. or the syndicate with a letter and summary thereof concerning the New Company substantially in the form and tenor of Annex C hereto; and Goldman, Sachs & Co. or the syndicate shall have the right to publish copies of said letter and summary thereof in its circular or otherwise. The capitalization and financial condition of the New Company and stock deliverable hereunder shall be in compliance with all the statements contained in said letter or summary thereof; and such statements shall be deemed to be representations on the basis of which Goldman, Sachs & Co. and/or the Syndicate shall be deemed to have purchased, or agreed

to find purchasers for the preference stock and common stock deliverable to the purchasers found by it hereunder.

Thirteenth: The New Company shall give Goldman, Sachs & Co. or the syndicate all such information regarding the New Company and its affairs and will execute and file all such papers as may be reasonably requested in order to facilitate the public offering of the preference stock and common stock and to enable the sale of the preference stock and common stock to be initially qualified under the Blue Sky Laws of such states as Goldman, Sachs & Co. in connection with the marketing of such shares may specify.

Fourteenth: The New Company, promptly upon request by Goldman, Sachs & Co., will apply on a "when issued" basis or otherwise for the listing of its preference stock [fol. 131] and/or of its common stock on the Boston Stock Exchange, on the New York Curb Exchange and/or on the Chicago Stock Exchange or on such other exchanges as may be agreed on; and Goldman, Sachs & Co. shall be under no obligation to give notice that it has formed the syndicate or to cause the syndicate to deliver its undertaking to find purchasers for said 1,000,000 shares of preference stock unless prior to the public offering thereof Central States and Trading shall have caused the 1,000,000 full-paid and non-assessable shares of common stock to have been authorized for listing and admission to trading on the Boston Stock Exchange. The New Company shall comply with all the rules and regulations of said exchange or exchanges in all respects in connection with such listing. The definitive stock certificates shall be in form complying with the requirements for listing on the New York Stock Exchange.

Fifteenth: Goldman, Sachs & Co. shall pay or cause to be paid all expenses in connection with the incorporation and organization of the New Company and the preparation, issue and delivery of the 5,000,000 shares of common stock of the New Company and the 1,000,000 shares of its preference stock including the original issue stamps thereon, New York or Federal transfer stamps on the 1,000,000 shares of common stock and 1,000,000 shares of preference stock to the purchasers to be found by the syndicate, the cost of qualifying the preference stock and common stock under

the various Blue Sky laws and the initial cost of listing the 5,000,000 shares of common stock and 1,000,000 shares of preference stock on the Boston Stock Exchange and/or the New York Curb Exchange or such other exchanges as Goldman, Sachs & Co. may determine prior to the final delivery date, the cost of preparation of temporary and definitive [fol. 132] stock certificates, the initial charges of the Transfer Agents and Registrars to countersign and register the preference stock and common stock to be delivered to the purchasers to be found by the syndicate and the 2,000,000 shares of common stock to be delivered to each of Central States and Trading, the cost of printing the charter, by-laws, etc. and all fees and disbursements of counsel.

Sixteenth: In case the preference stock and/or the common stock is not delivered as herein provided by reason of the default of either Central States or Trading, the party so defaulting shall reimburse the other parties hereto and the syndicate for all out-of-pocket expenses actually incurred by them respectively hereunder, including the making of preparations or arrangements for the offering or sale of the preference stock or common stock.

Seventeenth: For a period of one year from the date hereof or six months from the date of the termination of any syndicate or selling group formed by Goldman, Sachs & Co. in connection with the marketing of the preference and common stock, whichever date shall be earlier, the New Company shall not, without the consent of Goldman, Sachs & Co., in writing, issue and sell or distribute, or agree to issue and sell, or offer for issue or sale any additional shares of its preference stock of any series or any other class of stock (except for common stock issued upon conversion of the preference stock and common stock issued by way of dividends on the common stock or preference stock at current rates) or any of its obligations of indebtedness maturing more than twelve months after the date of issue thereof.

Eighteenth: For a period of one year from the date hereof or of six months from the date of the termination [fol. 133] of any syndicate or selling group formed by Goldman, Sachs & Co. in connection with the marketing of the preference or common stock, whichever date shall be earlier, Central States and Trading each agree that they will not,

without the consent of Goldman, Sachs & Co. in writing, sell any part of the 2,000,000 shares of common stock of the New Company to be purchased by each of them as hereinbefore provided.

Nineteenth: The original board of directors of the New Company shall consist of Messrs. Waddill Catchings, John Foster Dulles, Clifford F. Stone, Sidney J. Weinberg and Harrison Williams.

Twentieth: All notices under this agreement are to be in writing, and if to the New Company shall be sufficient in all respects if delivered in person or sent by registered mail to Shenandoah Corporation, care of Messrs, Sullivan & Cromwell, 48 Wall Street, New York, N. Y.; if to Central States shall be sufficient in all respects if delivered in person or sent by registered mail to C. F. Stone, President, Central States Electric Corporation, No. 60 Broadway, New York, N. Y.; if to The Goldman Sachs Trading Corporation shall be sufficient in all respects if delivered in person or sent by registered mail to The Goldman Sachs Trading Corporation, No. 30 Pine Street, New York, N. Y.; and if to the Bankers or the Syndicate shall be sufficient in all respects if delivered in person or sent by registered mail to Goldman, Sachs & Co., No. 30 Pine Street, New York, N. Y.

This agreement and each of its provisions will bind and enure to the benefit of the parties hereto and their respective successors and assigns.

In witness whereof, the parties hereto have duly executed [fol. 134] this agreement as of the day and year first above written.

Central States Electric Corporation, by (Sgd.) C. F. Stone, President; The Goldman Sachs Trading Corporation, by (Sgd.) Waddill Catchings, Vice-President; (Sgd.) Goldman Sachs & Co., Shenandoah Corporation, by (Sgd.) C. F. Stone, President.

EXHIBIT "A(2)"

July 24, 1929.

North American Securities Company, 60 Broadway, New York, N. Y.

DEAR SIRS:

This will confirm our understanding that your corporation has agreed to transfer and deliver to Shenandoah Corporation 96,154 full-paid and non-assessable shares of the common stock of the undersigned Corporation as such [fol. 135] shares shall be constituted after giving effect to the 200% stock dividend payable on July 25, 1929, and that the undersigned Corporation has agreed to pay your corporation therefor the sum of Five million Dollars ($5,000,000) in cash.

Delivery of such shares will be made to Shenandoah Corporation at the office of Goldman, Sachs & Co., No. 30 Pine Street, New York, N. Y., at 10 o'clock A. M. Eastern Daylight Saving Time, on August 7, 1929 against payment to you therefor in New York funds.

The certificates representing such shares of common stock shall be in transferable form as required by the New York Curb Exchange with all signatures guaranteed by a New York bank or Curb or New York Stock Exchange house satisfactory to Shenandoah Corporation. Your corporation will immediately provide Shenandoah Corporation with funds necessary to cover the cost of all stock transfer stamps required in connection with the transfer of such shares.

In case for any reason your corporation does not deliver such shares of common stock as above provided, the undersigned Corporation may, at its option, forthwith terminate this agreement, and in such case your corporation shall reimburse the undersigned Corporation for all out-of-pocket expenses incurred by it because of such failure to deliver, including all expenses which it may be required to pay pursuant to the terms of an agreement dated July 23, 1929, between the undersigned Corporation, The Goldman Sachs Trading Corporation, Goldman, Sachs & Co. and Shenandoah Corporation because of such failure to deliver, with a copy of which agreement your corporation has been furnished.

Please confirm that the foregoing is in accordance with your understanding by signing and returning the enclosed [fol. 136] counterpart of this letter, whereupon it will constitute a binding agreement between us.

Very truly yours, Central States Electric Corporation, by (sgd.) C. F. Stone, President.

Confirmed and accepted: July 24, 1929. North American Securities Company, by (sgd.) L. E. Kilmarx, President.

EXHIBIT "B(1)"

Agreement dated August 19, 1929 between Central States Electric Corporation, a Virginia corporation (hereinafter called "Central States"), party of the first part, The Goldman Sachs Trading Corporation, a Delaware corporation (hereinafter called "Trading"), party of the second part, Shenandoah Corporation, a Delaware corporation (hereinafter called "Shenandoah"), party of the third part, Blue Ridge Corporation, a Delaware corporation (hereinafter called the "Corporation"), party of the fourth part and Goldman, Sachs & Co., a copartnership having its principal place of business in the City of New York (hereinafter called the "Bankers"), party of the fifth part.

The parties hereto hereby agree together as follows:

First: Shenandoah shall issue and sell to Central States, and Central States shall purchase from Shenandoah, 375,000 [fol. 137] full-paid and non-assessable shares, without par value, of the common stock of Shenandoah, at the price of $33.33⅓ per share and 375,000 full-paid and non-assessable shares, of the par value of $50 each, of the Optional 6% Convertible Preference Stock, Series of 1929, of Shenandoah at the price of $50 per share, plus accrued (cash) dividends to the date of delivery. Shenandoah shall issue and sell to Trading, and Trading shall purchase from Shenandoah, 375,000 full-paid and non-assessable shares, without par value, of the common stock of Shenandoah at the price of $33.33⅓ per share and 375,000 full-paid and non-assessable shares, of the par value of $50 each, of the Optional 6% Convertible Preference Stock, Series of 1929, of Shenandoah at the price of $50 per share, plus accrued (cash) dividends to the date of delivery.

Second: The Corporation shall issue and sell to Shenandoah, and Shenandoah shall purchase, from the Corporation, 6,250,000 full-paid and non-assessable shares, without par value of Common Stock of the Corporation for the aggregate price of $62,500,000.00.

Third: The Corporation shall issue and sell to the Bankers, and the Bankers shall purchase from the Corporation, 1,000,000 full-paid and non-assessable shares, without par value, of the Common Stock of the Corporation for the aggregate price of $15,000,000 and 1,000,000 full-paid and non-assessable shares, of the par value of $50 each, of the Optional 6% Convertible Preference Stock, Series of 1929, of the Corporation for the aggregate price of $50,000,000 plus accrued (cash) dividends to the date of delivery.

Fourth: Delivery of the 1,000,000 shares of Common Stock of the Corporation to the Bankers, in the form of [fol. 138] temporary certificates issued in the name of Goldman, Sachs & Co. in such denominations as the Bankers may request, shall be made to the Bankers against payment therefor in New York funds, at the office of Goldman, Sachs & Co., No. 30 Pine Street, New York, N. Y., at 3:00 o'clock P. M. (Eastern Daylight Saving Time) on August 19, 1929.

At the request of the Bankers, Shenandoah shall loan to the Bankers, for the purpose of taking up and paying for the said 1,000,000 shares of Common Stock of the Corporation, the sum of $15,000,000, without interest, to be repaid to Shenandoah contemporaneously with the delivery to the Bankers of the 1,000,000 shares of Preference Stock of the Corporation, as hereinafter provided. If for any reason the transactions as provided in this Agreement shall not be consummated, the Bankers shall have the right to "put" all or any part of the 1,000,000 shares of Common Stock of the Corporation to Shenandoah at the price of $15 per share, and Shenandoah shall reimburse the Bankers for the cost of any stock transfer stamps in connection therewith.

Fifth: Delivery of the 1,000,000 shares of Preference Stock of the Corporation to the Bankers, in the form of temporary certificates issued in the name of Goldman, Sachs & Co. in such denominations as the Bankers may request, shall be made to the Bankers against payment

therefor in New York funds, at the office of Goldman, Sachs & Co., No. 30 Pine Street, New York, N. Y., at 10:00 o'clock A. M. (Eastern Daylight Saving Time) on September 5, 1929.

Delivery of the 375,000 shares of common stock and the 375,000 shares of preference stock of Shenandoah to Central States, in the form of temporary certificates issued in such names and denominations as Central States may request, and delivery of the 375,000 shares of common stock and the [fol. 139] 375,000 shares of preference stock of Shenandoah to Trading, in the form of temporary certificates issued in the name of Goldman, Sachs & Co. in such denominations as Trading may request, shall be made to Central States and Trading, respectively, against payment therefor in New York funds, contemporaneously with the delivery by the Corporation to the Bankers of the 1,000,000 shares of its Preference Stock.

Delivery of the 6,250,000 shares of Common Stock of the Corporation to Shenandoah, in the form of temporary certificates issued in such names and denominations as Shenandoah may request, shall be made to Shenandoah, against payment therefor in New York funds, contemporaneously with the delivery by the Corporation to the Bankers of the 1,000,000 shares of its Preference Stock.

Sixth: Attached hereto as Annexes A and B, respectively, are true copies of the certificate of incorporation and by-laws of the Corporation. The Corporation undertakes and warrants that at the time of delivery to the Bankers of the shares of the Common Stock and Preference Stock of the Corporation and at the time of delivery to Shenandoah of the shares of Common Stock of the Corporation, its certificate of incorporation and by-laws shall be in the form and tenor of said Annexes A and B, with only such changes therein as the parties hereto may agree to in writing.

Seventh: The validity and legality of the incorporation and the existence of the Corporation and of the authorization and issue of the stock of the Corporation and of Shenandoah, full-paid and non-assessable, as well as the form and substance of all papers and documents used in connection with the performance of this Agreement, shall be subject to the approval of Messrs. Sullivan & Cromwell;

[fol. 140] and each of the parties hereto shall cause them to be furnished with all papers and information which they may reasonably request in this connection. Contemporaneously with each delivery and payment hereunder each of the parties hereto shall receive from Messrs. Sullivan & Cromwell their written opinion passing favorably on the aforesaid matters.

Eighth: The Bankers may offer and sell the 1,000,000 shares of Preference Stock and 1,000,000 shares of Common Stock of the Corporation, at its election, on a "when issued," basis or otherwise; and prior thereto the Corporation will cause its President or other appropriate officer to furnish the Bankers with a letter and summary thereof, concerning the Corporation, substantially in the form and tenor of Annexes C and D hereof, respectively. The Bankers and/or any group formed by the Bankers in connection with the marketing of said stock shall have the right to publish copies of said letter and summary in their circular or otherwise. The Corporation represents and warrants that the statements contained in said letter and summary are true, and agrees that such statements shall be representations on the basis of which the Bankers shall have purchased the Common Stock and Preference Stock of the Corporation hereunder.

Ninth: The Corporation will give the Bankers all such information regarding it and its affairs, and will execute and file all such papers as may be reasonably requested in order to facilitate the public offering of the Common Stock and the Preference Stock of the Corporation and to permit the qualification for sale of such stock under the Blue Sky Laws of such states as the Bankers may specify.

[fol. 141] Tenth: Promptly upon request of the Bankers, the Corporation will apply for listing (upon a "when issued" basis or otherwise) of its Preference Stock and its Common Stock on the Boston Stock Exchange, on the New York Curb Exchange and/or the Chicago Stock Exchange or such other exchanges as may be agreed upon; and the Bankers shall be under no obligation to take up and pay for said 1,000,000 shares of Preference Stock unless prior to August 22, 1929 the Corporation shall have caused 1,000,000 shares of its Common Stock to have been authorized for listing and admission to trading on the Bos-

ton Stock Exchange. The Corporation shall comply with all the rules and regulations of said exchange or exchanges in all respects in connection with such listing. The definitive stock certificates shall be in the form complying with the requirements for listing on the New York Stock Exchange.

Eleventh: The Bankers shall pay or cause to be paid all expenses in connection with the incorporation and organization of the Corporation and the preparation, issue and delivery of the 7,250,000 shares of Common Stock and 1,000,000 shares of Preference Stock of the Corporation, including original issue stamps with respect thereto, the cost of qualifying the Preference Stock and Common Stock under the various Blue Sky Laws, the initial cost of listing of 7,250,000 shares of Common Stock and 1,000,000 shares of Preference Stock of the Corporation on the Boston Stock Exchange and the New York Curb Exchange, and such other exchanges as the Bankers may determine prior to the delivery date, the cost of preparing temporary and definitive stock certificates of the Corporation, the initial charges of the transfer agents and registrars for the counter-signature and registration of 7,250,000 shares of Common Stock and [fol. 142] 1,000,000 shares of Preference Stock of the Corporation, the cost of printing the certificate of incorporation, by-laws, etc., and all fees and disbursements of counsel, provided, however, that the Bankers shall not bear any part of the expenses in connection with the shares to be issued in exchange for stocks of other corporations as provided in Annex C.

In case the Preference Stock and/or Common Stock of the Corporation is not delivered as herein provided by reason of the default of either Central States or Trading or Shenandoah or the Corporation, the party so defaulting shall reimburse the other parties hereto for all out-of-pocket expenses actually incurred by them, respectively, hereunder, including the making of preparations or arrangements for the offering or sale of the Common Stock and/or Preference Stock of the Corporation.

Twelfth: Until six months after the termination of any Syndicate or group formed by the Bankers in connection with the marketing of the stock, but not exceeding one year from the time of delivery to the bankers of the stock hereunder, the Corporation will not, without the written

consent of the Bankers, issue and sell or distribute, or offer for issue and sale, any additional shares of its stock of any class (except shares issued upon conversion of the Preference Stock and by way of dividends on the Common Stock or Preference Stock and except for shares issued in exchange for stocks of other corporations as provided in Annex C hereof) or any of its obligations of indebtedness maturing in more than twelve months after the date of issue thereof.

Thirteenth: Until six months after the termination of any Syndicate or group formed by the Bankers in connection with the marketing of the stock, but not exceeding one year from the time of delivery to the Bankers of the stock [fol. 143] hereunder, Shenandoah will not, without the written consent of the Bankers, sell any part of the 6,250,000 shares of the Common Stock of the Corporation to be purchased by it as herein provided.

Fourteenth: The original Board of Directors of the Corporation shall consist of Messrs. Waddill Catchings, John Foster Dulles, Clifford F. Stone, Sidney J. Weinberg and Harrison Williams.

Fifteenth: All notices under this Agreement shall be in writing, and if to Central States shall be sufficient in all respects if delivered in person or sent by registered mail to C. F. Stone, President of Central States Electric Corporation, No. 60 Broadway, New York, N. Y.; if to Trading shall be sufficient in all respects if delivered in person or sent by registered mail to The Goldman Sachs Trading Corporation, No. 67 Wall Street, New York, N. Y.; if to Shenandoah shall be sufficient in all respects if delivered in person or sent by registered mail to C. F. Stone, President of Shenandoah Corporation, No. 60 Broadway, New York, N. Y.; if to the Corporation shall be sufficient in all respects if delivered in person or sent by registered mail to C. F. Stone, President of Blue Ridge Corporation, No. 60 Broadway, New York, N. Y., and if to the Bankers shall be sufficient in all respects if delivered in person or sent by registered mail to Goldman, Sachs & Co., No. 30 Pine Street, New York, N. Y.

This Agreement and each of its provisions shall bind and enure to the benefit of the parties hereto and their respective successors and assigns.

In witness whereof, the parties hereto have duly exe- [fol. 144] cuted this Agreement as of the day and year first above written.

Central States Electric Corporation, By (Sgd.) C. F. Stone, President; The Goldman Sachs Trading Corporation, By (Sgd.) Waddill Catchings, President; Shenandoah Corporation, By (Sgd.) C. F. Stone, President; Blue Ridge Corporation, By (Sgd.) C. W. Schroeder, Vice-President; Goldman, Sachs & Co., (sgd.) (Goldman, Sachs & Co.)

[fol. 145] EXHIBIT "B(2)"

Blue Ridge Corporation, Sixty Broadway, New York

August 21, 1929.

Central States Electric Corporation, New York, N. Y.

DEAR SIRS:

This is to confirm the fact that you have agreed to sell to us and we have agreed to purchase from you the following securities for $35,000,041, their aggregate market value at the close of business on August 17, 1929:

Shares		Closing Market 8/17/29	Total
29,200	Commercial Investment Trust Corpn.	185	$5,402,000.
69,000	Mathieson Alkali Works	59	4,071,000.
18,000	Detroit Edison Company	349	6,282,000.
7,900	Stone & Webster	166	1,311,400.
14,000	Pacific Gas & Electric Co.	76¾	1,074,500.
4,000	Peoples Gas Light & Coke Co.	396	1,584,000.
7,000	American Tel. & Tel. Co.	293	2,051,000.
10,000	Consolidated Gas Co. of New York	179¾	1,797,500.
68,423	The North American Co.	167	11,426,641.

This purchase is to be made subject to the following terms and conditions:

For thirty days from September 5, 1929, you are to have a "call" on the following of the securities listed

[fol. 146] above at a price equal to two points above the prices paid by us for said securities as indicated above:

Shares	
18,000	Detroit Edison Company.
14,000	Pacific Gas & Electric Co.
4,000	Peoples Gas Light & Coke Co.
7,000	American Tel. & Tel. Co.
10,000	Consolidated Gas Co. of New York.

and in case you shall exercise such "call" you are to have for a like period of thirty days from September 5, 1929, a "put" of said last-mentioned securities to us at a price equal to two points above the prices paid by us to you therefore as indicated above.

Kindly indicate your agreement with all of the foregoing by signing and returning the enclosed duplicate hereof, whereupon this letter will constitute the agreement between us.

Very truly yours, Blue Ridge Corporation, By (Sgd.) C. F. Stone, Pres.

Confirmed: August 21, 1929.

Central States Electric Corporation, By L. E. Kilmarx, V. P.

[fol. 147] EXHIBIT "E"

Memorandum of Agreement, Between Central States Electric Corporation and American Cities Power & Light Corporation (Hereinafter Referred to as "First Parties") and Tri-Continental Corporation and Selected Industries Incorporated (Hereinafter Referred to as "Second Parties").

1. First Parties agree to sell and deliver to Second Parties 1,243,000 shares of Common Stock of Electric Shareholdings Corporation (hereinafter called Electric Shareholdings), in exchange for 1,864,500 shares of Common Stock of Blue Ridge Corporation (hereinafter called Blue Ridge), and in consideration thereof Second Parties agree to sell and deliver to First Parties 1,864,500 shares of Common Stock of Blue Ridge in exchange for 1,243,000 shares of Common Stock of Electric Shareholdings. Such

exchange shall be consummated at the office of American Cities Power & Light Corporation, No. 1 Exchange Place, Jersey City, New Jersey, on or before the close of business on Tuesday, November 22, 1938. All certificates shall be duly endorsed in blank for transfer, or be accompanied by duly executed stock transfer powers in blank, with signatures duly guaranteed, and shall bear all necessary stock transfer tax stamps.

2. The obligation of Second Parties to make the exchange is subject to the following conditions precedent:

(a) That Second Parties shall have been furnished prior to the exchange with a certificate of Touche, Niven & Co. to the effect that the balance sheet of Electric Shareholdings as at November 16, 1938, which is attached hereto as Exhibit A, correctly reflects the financial condition of Electric Shareholdings as of that date.

[fol. 148] (b) That at the time of such exchange the portfolio of stocks and other securities owned by Electric Shareholdings shall consist of the stocks and other securities set forth on Exhibit B annexed hereto.

(c) That First Parties shall have delivered to Second Parties prior to the exchange a certificate signed by the President and Treasurer of Electric Shareholdings to the effect that to the best of their knowledge, information and belief there were no liabilities or commitments, direct or contingent, including liability for Federal taxes, of Electric Shareholdings as of November 16, 1938, which are not reflected on said balance sheet, Exhibit A, and that between the date of such balance sheet and the date of such exchange no cash has been disbursed except in payment of ordinary operating expends in due course or in connection with the portfolio changes hereinafter referred to, and no additional liabilities or commitments have been incurred or taken except such as may be necessary to change the portfolio to correspond with the portfolio referred to in paragraph (b) above, and that no other transaction has taken place between such dates except as contemplated by this Agreement.

(d) That First Parties shall have delivered to Second Parties a letter from Messrs. Sullivan &

Cromwell, counsel for Electric Shareholdings, stating that to the best of their knowledge, information and belief there is no material pending or threatened litigation against Electric Shareholdings.

3. The obligation of First Parties to complete the exchange shall be subject to the condition precedent that between November 16, 1938, and the date of such exchange Blue Ridge shall not have entered into any new trans- [fol. 149] action or commitment or incurred any new liability without securing the prior approval of First Parties.

4. Second Parties shall have the right, at their option, in lieu of delivering 1,864,500 shares of Common Stock of Blue Ridge upon the exchange herein provided for, to deliver 1,612,161 shares of Common Stock of Blue Ridge plus a due bill calling for the delivery of an additional 252,339 shares of Common Stock of Blue Ridge within seven days after the date of such exchange. If such option is exercised, the due bill will be delivered to American Cities Power & Light Corporation.

5. The obligations of First Parties and Second Parties to each other hereunder shall be joint and several, but as between the two First Parties and as between the two Second Parties it is contemplated that the stocks deliverable upon the exchange herein provided for will be as follows:

	Electric Shareholdings stock deliverable	Blue Ridge stock receivable
Central States Electric Corporation	594,432 shs.	891,648 shs.
American Cities Power & Light Corporation	648,568 "	972,852 "
Total	1,243,000 "	1,864,500 "

	Electric Shareholdings stock receivable		Blue Ridge stock deliverable	
Tri-Continental Corporation	3 957,35[0]*	shs.	1,436,030	shs.
Selected Industries Incorporated	7 285,64 [1]*	"	428,470	"
Total	1,243,000	"	1,864,500	"

* Figures enclosed in brackets struck out.

[fol. 150] 6. The obligations of each of the four parties to this Agreement are further conditioned upon the approval or ratification of this Agreement by the Boards of Directors of all the parties hereto on or before the close of business on Monday, November 21, 1938.

In witness whereof, each of the parties hereto has caused this Agreement to be duly executed and delivered in Jersey City, New Jersey, this 18th day of November, 1938.

Central States Electric Corporation, by (Sgd.) L. E. Kilmarx, Vice Pres.

Attest: (Sgd.) Addison Boren, Asst. Secy.

American Cities Power & Light Corporation, by (Sgd.) C. M. Finney, President, First Parties.

Attest: (Sgd.) H. A. Andersen, Secy.

Tri-Continental Corporation, by (Sgd.) Thurston P. Blodgett, Vice-President.

Attest: (Sgd.) Kenneth N. Chalmers, Secy.

Selected Industries Incorporated, by (Sgd.) Paul Barthelet, Vice President, Second Parties.

Attest: (Sgd.) Kenneth N. Chalmers.

[fol. 151] EXHIBIT "I(1)"

New Empire Corporation

Sixty Broadway, New York

February 15, 1923.

Central States Electric Corporation, 60 Broadway, New York, N. Y.

GENTLEMEN:

We submit for your consideration the following proposal:

(a) For and in consideration of the compensation hereinafter set forth, we will undertake supervision of the operation and financing of your business and will make available to you in connection therewith the advice, assistance and service of our entire organization, which shall include experts thoroughly experienced in the analysis of the intrinsic and market values of securities and investments, such organization to be equipped to render you all services required other than such services as your officers with the approval of your Board of Directors may otherwise provide for.

(b) With your approval, we shall furnish at our expense a President, Vice-President, Treasurer, Secretary and such additional officers as may be elected by your Board of Directors to serve at its pleasure and none of whom shall draw any salaries from your company, and in addition such employees as your officers may require in performing their duties.

(c) We shall maintain or provide for the mainten-[fol. 152] ance, at our expense, all such offices as may be required by your company for the use of its officers in the transaction of its business. Without expense to you, we shall furnish all necessary data and records for the keeping of the corporate books and from time to time, as may be required by your Board of Directors, prepare full and complete reports of the operation, condition and management of your business.

Our services will not include services as transfer agent and registrar, or the services of public accountants, and expenses incidental to the holding of your stockholders,

directors, and executive committee meetings, which are to be borne by you.

For the foregoing services you will make monthly payments to the undersigned at the rate of $65,000 per annum.

This agreement shall commence as of February 1, 1923, and may be terminated at any time by either of the parties hereto, upon thirty (30) days' written notice to the other party, and shall continue in force until so terminated.

Your acceptance hereof shall constitute an agreement between us.

Yours very truly, New Empire Corporation, by (Sgd.) Loring H. Hoover, Vice-President.

Accepted: Central States Electric Corporation, by (Sgd.) R. E. Glass, Vice-President.

[fol. 153] EXHIBIT "I-(2)"

New Empire Corporation

Sixty Broadway, New York

October 1, 1924.

Central States Electric Corporation, 60 Broadway, New York City.

GENTLEMEN:

This will confirm agreement with you to modify your contract with us dated February 15, 1923, so that compensation for services be reduced, and that payments thereunder, beginning today, shall be paid monthly at the rate of $18,000 per annum.

Yours very truly, New Empire Corporation, by (Sgd.) Loring R. Hoover, Vice President.

EXHIBIT "K(1)"

The North American Co., 60 Broadway, New York, N. Y.

DEAR SIRS:

Ashland Securities Corporation proposes that there shall be formed under your supervision a corporation organized under the laws of Delaware under a name approved by you,

with a capitalization and assets described in the attached [fol. 154] circular. It is proposed that you transfer to such corporation to be formed $11,015,200 par value of common stock (being all the common stock) of Union Electric Light & Power Co. (of St. Louis) and also transfer to the nominee of the undersigned $3,000,000 par amount of the 6 per cent preferred stock of the North American Co. and that in consideration thereof the North American Co. will receive 200,000 shares (being all the common shares without par value) of the corporation to be formed.

Delivery of securities to be at the office of the North American Co. in New York City within 30 days from date.

Ashland Securities Corporation agrees that it will, in the event of the acceptance of this offer by you, enter into two agreements with the corporation to be formed, as shown in the two annexed letters from it to such corporation.

Ashland Securities Corporation, by Leonard Kennedy, President; R. E. Glass, Secretary.

March 24, 1922.

EXHIBIT "K(2)"

North American Edison Co.

DEAR SIRS:

We offer to sell to you $10,940,100 par value of the common stock of the Cleveland Electric Illuminating Co. for $11,540,000 cash, delivery to be made at the office of the North American Co. in New York City not later than 30 days from date.

It is understood that in addition the North American [fol. 155] Co. shall deliver to us or our nominees $3,000,000 par value of the 6 per cent cumulative preferred stock, also for this account.

Ashland Securities Corporation, by Leonard Kennedy, President; R. E. Glass, Secretary.

March 24, 1922.

EXHIBIT "K(3)"

New York, N. Y., March 24, 1922.

Central States Electric Corporation, New York City.

GENTLEMEN:

We offer to buy from you $10,940;100 par value of the common stock of the Cleveland Electric Illuminating Co. to be delivered to us or to our nominees for $3,000,000 par amount preferred stock of the North American Co. and $10,810,200 cash.

Delivery to be made at the office of the North American Co. in New York City within 30 days from date.

In the event that you are not able to make delivery because of failure of approval of Ohio Public Utilities Commission this agreement will be void and of no effect.

Please advise your acceptance.

Very truly yours, Ashland Securities Corporation, by Leonard Kennedy, President; R. E. Glass, Secretary.

[fol. 156] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION OF DEFENDANTS ONONDAGA CORPORATION, ET AL.

[Same Titles]

SIRS:

Please take notice, that on the summons herein, dated July 5, 1945, the complaint (as amended), the Marshal's returns of service of process on file herein respectively, the annexed affidavits of J. C. M. Colton, Clifford F. Stone, Clinton M. Finney, Albert E. Pardee and Harrison Williams, respectively, sworn to on the dates shown thereon, the undersigned will move this Court, at a Stated Term for Motions, to be held at the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on October 16, 1945, at 10:30 A. M. or as soon thereafter as counsel can be heard, for the following relief:

1. An order pursuant to Rule 56 for the entry of summary judgment in favor of the defendants Harrison Williams, Clifford F. Stone, Albert E. Pardee, Clinton M. Finney and Federal Utilities, Incorporated, dismissing the

complaint as to said defendants, on the ground that the transactions complained of are barred by the applicable State Statute of Limitations and the said defendants are entitled to a judgment in their favor as a matter of law;

2. An order for judgment pursuant to Rule 12(b) in favor of the defendants dismissing the complaint on the ground that the Southern District Court of New York lacks jurisdiction over the subject matter;

3. An order for judgment pursuant to Rule 12(b) in favor of defendants New Empire Corporation, Electric Invest- [fol. 157] ment Corporation and Utilities Securities Corporation, quashing the service of process and dismissing the complaint on the ground that said defendants are foreign corporations not doing business in New York and the Southern District Court lacks jurisdiction over the said defendants, and as to New Empire Corporation on the further ground that the claim against it did not arise in New York, and it is not licensed to do business in New York and the Southern District Court of New York is the improper venue.

4. An order for judgment pursuant to Rule 12(b) in favor of Onondaga Corporation and Federal Utilities, Incorporated, named as defendants, quashing the service of process and dismissing the complaint, on the ground that said corporations have been duly dissolved and are not amenable to suit and that there was insufficiency of service of process.

Please take further notice, that answering affidavits hereon shall be served prior to the day of hearing in accordance with the rules.

Dated: October 1, 1945.

Milton Pollack, Attorney for Onondaga Corporation, Federal Utilities Corporation, New Empire Corporation, Electric Investment Corporation, and Utilities Securities Corporation, named as Defend- [fol. 158] ants, Milton Pollack and Sullivan & Cromwell, Attorneys for Harrision Williams, Clifford E. Stone, Albert E. Pardee and Clinton

M. Finney, named as Defendants, Office & P. O. Address, 111 Broadway, Manhattan, New York, N. Y.

To: Austrian & Lance, Esqs., Attorneys for Plaintiffs, 61 Broadway, New York, N. Y.

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION OF DEFENDANTS SACHS, ET AL.

[Same Title]

SIRS:

Please take notice that, on the summons herein, dated July 5, 1945, the complaint, the Marshal's returns of service of process on file herein respectively, the annexed affidavits of Howard J. Sachs, sworn to August 29, 1945, and of John Foster Dulles, sworn to September 4, 1945, and of Walter E. Sachs and Henry S. Bowers, sworn to September 7, 1945, and of Sidney J. Weinberg, sworn to September 7, 1945, and of Waddill Catchings, sworn to September 11, 1945, the undersigned will move this Court, at a Stated Term for Motions, to be held at the United States Court House, Foley Square, in the Borough of Manhattan, [fol. 159] City of New York, on October 16, 1945, at 10:30 A. M. or as soon thereafter as counsel can be heard, for the following relief:

1. An order pursuant to Rule 56 for the entry of summary judgment in favor of the defendants Howard J. Sachs, Walter E. Sachs, Dulles, Bowers, Weinberg and Catchings, and each of them dismissing the complaint as to said defendants, and each of them, on the ground that the transaction and transactions complained of are barred by the applicable State Statute of Limitations and the said defendants are entitled to a judgment in their favor and in the favor of each of them as a matter of law;

2. An order for judgment pursuant to Rule 12(b) in favor of the defendants and each of them dismissing the complaint on the ground that the Southern District Court of New York lacks jurisdiction over the subject matter herein.

3. An order for judgment pursuant to Rule 12(b) in favor of the defendant Howard J. Sachs on the ground that the venue of these claims in the Southern District of New York is improper.

Please take further notice, that answering affidavits hereon shall be served prior to the day of hearing in accordance with the rules.

Dated: October 1, 1945.

Sullivan & Cromwell, Attorneys for Defendants Walter E. Sachs, Howard J. Sachs, Henry S. Bowers, Sidney J. Weinberg, John Foster Dulles and Waddill Catchings, 48 Wall Street, New York 5, N. Y.

[fol. 160] To: Austrian & Lance, Esqs., Attorneys for Plaintiffs, 61 Broadway, New York, N. Y.

In United States District Court

Motions of the Defendants Fogarty and Freeman

[Same Title]

Defendants James F. Fogarty and Herbert C. Freeman move the court as follows:

1. To dismiss the action as against said defendants and each of them, pursuant to Rule 12(b) of the Rules of Civil Procedure for the District Courts of the United States, because the court lacks jurisdiction of the subject matter and of the claim or claims allegedly asserted therein against said defendants and each of them, as appears from the complaint, as amended.

2. For summary judgments in favor of said defendants and each of them, pursuant to Rule 56(b) of the Rules of Civil Procedure for the District Courts of the United States, on the ground that this action was not commenced as against said defendants, or either of them, within the period or periods limited by law for the commencement of an action thereon, all as more fully appears from the summons, the Marshal's returns of the alleged services thereof upon said defendants, the complaint, as amended,

[fol. 161] and the annexed affidavits of said defendants sworn to September 27, 1945.

Dated: October 1, 1945.

LeBoeuf & Lamb, Attorneys for Defendants Fogarty and Freeman, 15 Broad Street, Borough of Manhattan, New York 5, New York.

In United States District Court

Notice of Motion of Defendants Niven, et al.

[Same Title]

Sirs:

Please take notice that on the summons, the amended complaint, the Marshal's return of service or process, all on file herein, and upon the annexed affidavit of Francis J. Clowes, sworn to on the 5th day of October, 1945, the undersigned will move this Court, at a Stated Term for Motions, to be held at the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on October 16th, 1945, or as soon thereafter as counsel can be heard for the following relief:

1. An order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the entry of summary judgment in favor of the defendants, John B. Niven, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, William C. Bechart and Jacob P. Friedman co-partners doing business as accountants and auditors under the firm name and style of Touche, [fol. 162] Niven & Co., dismissing the complaint as to said defendants, on the ground that the complaint fails to state a claim against the defendants upon which relief can be granted in that the action is barred by the applicable State Statute of Limitations and the said defendants are entitled to a judgment in their favor as a matter of law;

2. An order, pursuant to Rule 12(B) of the Federal Rules of Civil Procedure, for the entry of judgment in favor of the defendants aforesaid, dismissing the complaint on the ground that in the absence of diversity of citizenship the District Court of the United States for

the Southern District of New York lacks jurisdiction over the subject matter herein.

Please take further notice, that answering affidavits hereon shall be served prior to the day of hearing.

Dated, October 5th, 1945.

Yours etc., Hawkins, Delafield & Longfellow, By C. O. Donahue, A Member of the Firm, Attorneys for Defendants; John B. Niven, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, William C. Bechart and Jacob P. Friedman, Office and Post Office Address, 67 Wall Street, New York 5, N. Y.

To: Austrian & Lance, Esqs., Attorneys for Plaintiffs, Office and Post Office Address, 61 Broadway, Borough of Manhattan, City of New York.

[fol. 163] In United States District Court

[Same Title]

Austrian & Lance, Esqs., Attorneys for Plaintiffs, 61 Broadway, New York City. (Saul J. Lance, Esq., and Isadore H. Cohen, Esq., of Counsel.)

Sullivan & Cromwell, Esqs., and Milton Pollack, Esq., Attorneys for Harrison Williams, Clifford F. Stone, Albert E. Fardee, Clinton M. Finney, Onondaga Corporation, Federal Utilities Corporation, New Empire Corporation, Electric Investment Corporation and Utilities Securities Corporation, 48 Wall Street, New York 5, N. Y. (Milton Pollack, Esq., of Counsel.)

Sullivan & Cromwell, Esqs., Attorneys for Defendants, Howard J. Sachs, Walter E. Sachs, Bowers, Weinberg, Dulles and Catchings, 48 Wall Street, New York 5, N. Y. (E. H. Sykes, Esq., and William Piel, Jr., Esq., of Counsel.)

LeBoeuf & Lamb, Esqs., Attorneys for Defendants, James F. Fogarty and Herbert C. Freeman, 15 Broad Street, New York 5, N. Y. (Horace R. Lamb, Esq., and Craigh Leonard, Esq., of Counsel.)

Hawkins, Delafield & Longfellow, Esqs., Attorneys for John B. Niven, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, Wil-

liam C. Beckert, Jacob P. Friedman, 67 Wall Street, New York 5, N. Y.

Roger S. Foster, Esq., Solicitor, Arnold R. Ginsburg, Esq., Lawrence M. Greene, Esq., Harold V. Lese, Esq., Attorneys, Securities and Exchange Commission, 18th and Locust Streets, Philadelphia 3, Pennsylvania.

OPINION OF LEIBELL, D. J.

[fol. 164] LEIBELL, D. J.:

In accordance with the direction of the Circuit Court of Appeals, Fourth Circuit, in the *Matter of Central States Electric Corporation*, 143 F. 2d 684, the plaintiffs herein were substituted as trustees of Central States Electric Corporation in the proceeding for the reorganization of that corporation under Chapter X of the Bankruptcy Act. After an investigation, pursuant to Sec. 167 of the Act, these trustees brought this action July 15, 1945, against the officers and directors (past and present) of the corporation, its principal common stockholder, directors of companies which had transactions with the debtor, and others. The complaint alleges that the defendants conspired to waste, destroy, misappropriate and otherwise wrongfully deal with the property and assets of the debtor and that the defendants were guilty of breaches of trust and waste of assets. Plaintiffs as trustees seek an accounting for the assets, losses and profits involved in the alleged wrongful transactions. The plaintiffs on August 20, 1945, amended their complaint to include an allegation of fraudulent concealment of the facts surrounding the transactions that were previously alleged to constitute waste, etc., so that they were not discoverable until after the investigation of November 15, 1944, was ordered. The proceedings under Chapter X of the Bankruptcy Act were commenced in February 1942. The acts complained of occurred in 1922, 1927-1929 and in 1938. The defendants herein have moved, under Rules 12 and 56 of the Federal Rules of Civil Procedure, for dismissal of the complaint on the ground that this Court lacks jurisdiction of the subject matter and for summary judgment on the ground that the applicable statutes of limitations bar the claims.

The jurisdiction of this Court has been questioned by defendants' motions under Rule 12 of the Federal Rules

[fol. 165] of Civil Procedure. In paragraph A-9 of the complaint the plaintiffs invoke the jurisdiction of the Court under the authority of the Constitution (Art. I, Sec. 8, Clause 4), the Act of Congress relating to bankruptcies (U. S. Code Title 11), and the provisions of the Judicial Code [Sec. 24(1), (19)—28 U. S. C. A. §41(1)(19)]. The amount in controversy is alleged to be in excess of $3,000. There is no allegation of diversity of citizenship in the complaint and it is not relied upon to establish jurisdiction in this Court.

The constitutional clause referred to is that which empowers Congress to establish uniform laws on the subject of bankruptcy.

Subdivision 19 of §24 of the Judicial Code provides that the district courts shall have original jurisdiction "of all matters and proceedings in bankruptcy".

28 U. S. C. A. 41(1)(19) states:—

> "Section 41. (Judicial Code, section 24, amended.) Original Jurisdiction. The district courts shall have original jurisdiction as follows:
>
> (1). *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects." [See §41 U. S. C. A. T. 28 p. 32.]

[fol. 166] This is not a suit arising under the Constitution or laws of the United States. A federal question is presented only if it appears from the plaintiffs' statement of facts that a construction of a provision of the Constitution or of a federal statute would sustain or defeat plaintiffs' claim. The federal nature of the right to be established, not the source of the authority to establish it is decisive. *Gully* v. *First National Bank*, 299 U. S. 109; *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526. The causes of action herein

are for breach of fiduciary duty and for waste of assets. The trustees appointed in the Chapter X proceedings have merely inherited the claims from the corporate bankrupt. The claims are based on common law rights, state-created rights. This action does not take its initial genesis by virtue of the provisions of the Bankruptcy Act; only the trustees' authority to sue flows from that source. *McBride v. Farrington*, 60 F. Supp. 92, 94 (D. C. Ore. 1945).

This Federal District Court is not granted jurisdiction over the subject matter of this action under any provision of the Bankruptcy Act. Plaintiffs rely upon Section 2(a)(7) of the Act of 1898, as amended, [11 U. S. C. A. 11(a)(7)] which I quote as follows:—

> "Creation of Courts of Bankruptcy and Their Jurisdiction.
>
> a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—
>
> [fol. 167] (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest;"

The words "except as herein otherwise provided" refer to §23 of the Act, which will be discussed later. (*Baides v. Hawarden Bank*, 178 U. S. 524 at p. 535). Section 2 of the Act of 1898 was derived from Section 1 of the Bankruptcy Act of 1867, which also constituted the several district courts as courts of bankruptcy, with original jurisdiction in their several districts in all matters and proceedings in bankruptcy. It is important to keep in mind the distinc-

tion between the jurisdiction which a district court exercised as a court of bankruptcy over bankruptcy proceedings under Section 1 of the Act of 1867, and the jurisdiction conferred on a district court as such, by Section 2 of the Act of 1867, over plenary suits to which the bankrupt assignee was a party.

Section 2 of the Act of 1867 conferred a jurisdiction on the federal District Courts that was substantially different from the jurisdiction constituted under Section 1 of the Act of 1867, or under Section 2 of the Act of 1898. This is apparent from a reading of the pertinent part of Section 2 of the Act of 1867 which provided:

> "Said circuit courts shall also have concurrent jurisdiction with the district courts of the same District of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person [fol. 168] against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee." 14 Stat. 518.

By the amendment of 1874 (18 Stat. 178) the words "the same district" were changed to read "any district"; and the words "or owing any debt to such bankrupt" were added next after the words "adverse interest". [The Bankruptcy Act of 1867 was entirely repealed June 7, 1878 (20 Stat. 99), and for the next twenty years until July 1, 1898 (30 Stat. 544) there was no National Bankruptcy Act.]

The jurisdictional provisions of the Act of 1867 (as amended June 22, 1874 [18 Stat. 178]) were analyzed and explained by Mr. Justice Bradley in *Lathrop* v. *Drake*, 91 U. S. 516 (1875). In that case the court held that the jurisdiction conferred on the federal District Courts by Section 2 of the Act of 1867, as amended, was that of "an ordinary court", of suits at law and in equity, to which the bankrupt's assignee was a party, involving property or rights of the bankrupt. The "bankruptcy court" had exclusive jurisdiction over the bankruptcy proceedings themselves, but—

> "the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction

> of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts [fol. 169] for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the Act. . . . and we concur in the opinion [in *Shearman* v. *Bingham*, 7 Bank. Reg. 419] that the several District Courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy." [*Lathrop* v. *Drake*, at p. 518.]

Thus any federal district court "as an ordinary court" had jurisdiction of a plenary suit at law or in equity, by the assignee in bankruptcy under the provisions of Section 2 of the Act of 1867, as amended, and the jurisdiction if exercised was "the regular jurisdiction between party and party, as described in the Judiciary Act (eleventh section) and the third article of the Constitution". *Morgan* v. *Thornhill*, 78 U. S. 65 at p. 80; quoted in *Bardes* v. *Hawarden Bank* (1900), 178 U. S. 524 at p. 532. The jurisdiction of the District Court under Section 1 of the Act of 1867 which controlled the bankruptcy proceedings themselves was that of a "court of bankruptcy"; it was the "principal court".

The following quotation from the opinion of Mr. Justice Gray in the *Bardes* case (p. 532) further emphasizes the distinction between the jurisdiction conferred by Section 2 as compared with that constituted by Section 1 of the Act of 1867—

> "It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely [fol. 170] to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the act of 1867; and not by summary proceedings under the first section thereof; notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the

assets of the bankrupt,' and 'to all acts, matters and things to be done under and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy. *Smith* v. *Mason* (1871), 14 Wall. 419; *Marshall* v. *Knox* (1872), 16 Wall. 551, 557; *Eyster* v. *Gaff* (1875), 91 U. S. 521, 525.

The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the second section of the act of 1867 upon the Circuit and District courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the state courts."

[Trustees in bankruptcy under the Act of 1898 "take the place and are vested with the power of assignees in bankruptcy under former bankrupt acts". *Bardes* v. *Hawarden Bank*, 178 U. S. 524, at p. 526.]

As stated by Chief Justice Hughes in *Schumacher* v. *Beeler*, 293 U. S. 367 at p. 372:

"The Act of 1867 recognized and emphatically declared the distinction between proceedings in bankruptcy, properly so-called and independent suits between assignees in bankruptcy and adverse claimants. Jurisdiction in such suits was conferred upon the District Courts and Circuit Courts of the United States by express provision to that effect in Section 2 of that Act [fol. 171] and was not derived from the other provisions of Sections 1 and 2 conferring jurisdiction of proceedings in bankruptcy."

It was with this legislative and judicial background that the Bankruptcy Act of 1898 was enacted. Section 2 of the Act of 1898 is entitled "Creation of Courts of Bankruptcy and their Jurisdiction". It took the place of Section 1 of the Act of 1867 and does not differ substantially from that section, except that it seems to specify in greater detail matters which relate to the proceedings in bankruptcy. The section does not refer to plenary actions at law or suits in equity, by or against the trustee in bankruptcy. *Bardes* v. *Hawarden Bank*, 178 U. S. 524 at p. 534. The Act of

1898 did not include a section with the broad law and equity jurisdictional provisions in independent civil actions by the trustee against adverse claimants, in federal District Courts, such as were contained in Section 2 of the Act of 1867. To provide for a more limited jurisdiction in such cases Congress included in the Act of 1898 Section 23(b) which was entitled "Jurisdiction of United States and State Courts". As originally enacted July 1, 1898, § 23, provided:

> "Sec. 23. Jurisdiction of United States and State Courts.—(a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.
>
> [fol. 172] (b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.
>
> (c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act."

In 1903 subdivision (b) was amended by adding thereto the words "except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e." In 1910 suits under "section seventy, subdivision e" were added to the exception.

In 1926 Section 23 was recast to read as follows:

> "(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as

though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

(b) Suits by the trustee shall be brought, or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of [fol. 173] property under section 60, subdivision b; section 67, subdivision e; and section 70, subdivision e."

When the Bankruptcy Act was revised in June, 1938, Section 23 was amended to read as follows:

"(a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67 and 70 of this Act."

Section 23 is not a limitation on any old powers of the District Court, but rather a new grant of jurisdiction.

"The Bankrupt Acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the Circuit and District Courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the Act of 1898, entirely omitted any similar provision, and substituted the restricted [fol. 174] provisions of section 23, it intended that.

either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier act." *Bardes* v. *Hawarden, supra*, p. 537.

Further testimony for this theory of a new grant of jurisdiction on condition, is found in the opinion of Chief Justice Hughes in *Schumacher* v. *Beeler*, 293 U. S. 367, 374 (1934):

> "In enacting Section 23 it was clearly the intent of Congress that the federal courts should not have the unrestricted jurisdiction of suits between trustees in bankruptcy and adverse claimants which these courts had exercised under the broad provisions of Section 2 of the Act of 1867. . . . Section 23(b) was thus in effect a grant of jurisdiction subject to that condition."

Plaintiffs argue that since Section 23(b) is not applicable to Chapter X corporate reorganization proceedings (it is expressly excluded therefrom by Section 102) it follows that Section 2a(7) of the Bankruptcy Act, hereinabove referred to, confers jurisdiction on this federal District Court to hear and determine this action for an accounting, a plenary suit in equity brought by the reorganization trustees against those who are charged with waste and misappropriation of the corporation's property.

The exclusion of Section 23(b) from Chapter X reorganization proceedings by Section 102 of the Act does not operate to revive the old law and equity plenary suit jurisdiction of Section 2 of the Act of 1867; nor does it clothe § 2(a)(7) of the Act of 1898 with a meaning and purpose similar to that of § 2 of the Act of 1867. In my opinion it would require something more than the language of § 102 of the Act of 1898 as added June 22, 1938 to accom- [fol. 175] plish so great a change in a jurisdictional provision. United States District Courts are courts of limited jurisdiction, possessing only such powers as Congress confers. *Ex parte Edelstein*, 30 F. 2d 636. *In re Hollins*, 229 F. 349. *In re Prima Co.*, 98 F. 2d 952 at p. 956. Any intent of Congress in 1938 to revive and reconfer a grant of jurisdiction repealed in 1898, should be sought in the language of the statute, and should not be based on a far-fetched inference. Section 2a(7) upon which the plain-

tiffs rely is a grant of extensive powers, but only to the district court which is sitting as the "bankruptcy court" in the proceeding. This seems clear from the language of the 1898 statute, the purposeful omission of Section 2 of the Act of 1867, and the construction given § 23 of the Act of 1898 in *Bardes* v. *Hawarden, supra.*

Chapter X and its predecessor Section 77B specifically provided that the powers and jurisdiction of the "bankruptcy court" should include the powers which a Court of the United States would have in an equity receivership over a debtor's property. This is evident from the provisions of Section 115 of the Act, which followed the language of Section 77B(a) of the former reorganization chapter. Section 115 states:

> "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

[fol. 176] In applying that provision of Section 77B the courts held that it was not inconsistent with Section 23—that the grant of equity receivership jurisdiction to the bankruptcy court under Section 77B related to jurisdiction over the debtor's property, wherever located, in proceedings in rem; but that it did not apply to plenary suits growing out of the receivership, suits in personam. *In re Standard Gas & Electric Co.* (3rd C. C. A. 1941), 119 F. 2d 658 at p. 662 and cases there cited. It was intimated in *Tilton v. Model Yari Corp.*, 112 F. 2d 86 at p. 88 that since § 102 of the Act made Sec. 23 inapplicable to proceedings under Chapter X, the District Court (i. e. the reorganization court) would have jurisdiction of a plenary suit by a trustee "even where the defendant did not consent" to jurisdiction. In the case at bar that would mean that the District Court in which the petition for reorganization was filed would have jurisdiction of the subject matter of this action, regardless of the unwillingness of the defendants to consent to its jurisdiction. Whether or not the

reorganization court could obtain jurisdiction of these defendants in personam, is another question discussed in the *Standard Gas & Electric Co.* case at p. 664.

The trustees in the reorganization proceeding under Chapter X, having the same powers as an equity receiver, may sue an adverse claimant in a plenary suit in the reorganization court without proof of diversity or other federal grounds to establish jurisdiction of the action; but if they seek to bring a plenary action against the adverse claimant in a district other than the reorganization district they are obliged to conform to the same jurisdictional requirements that an equity receiver was required to conform to. It seems, therefore, that the only change brought about by Chapter X in this connection is to provide the federal district court, in which the Chapter X proceedings are pending, as an additional forum for [fol. 177] a plenary suit by a reorganization trustee. See *Warder* v. *Brady* (4th C. C. A. 1940), 115 F. 2d 89 at p. 94; *In re Standard Gas & Electric Co.*, 119 F. 2d 658 at p. 662; *Gerdes, Corporate Reorganization*, 52 Harv. Law Rev. 1, 21.

This federal District Court is not the reorganization court of the plaintiff trustees, and as in the case of an equity receiver, they cannot maintain this action as ancillary to the bankruptcy proceedings without showing other grounds of jurisdiction. The trustees are not left without a forum. In addition to the district court of their appointment, (*Tilton* v. *Model Taxi Corp.*, *supra*) other federal district courts, where diversity of citizenship is shown, [28 U. S. C. A. § 41(1)(b)], and the appropriate state courts (*Hastings* v. *Bullesby & Co.*, 286 N. Y. 468) would have jurisdiction over this type of action.

As a matter of policy, there does not seem to be any valid reason why the trustee in a reorganization proceeding should not be permitted to institute in a district court, other than the Court of his appointment, a plenary suit against an adverse claimant, such as these defendants, without a showing of diversity of citizenship as the basis of federal jurisdiction. An amendment to the Bankruptcy Act to confer such jurisdiction may be desirable. However, that rests with the Congress. I have given careful consideration to all the relevant decisions and to the legislative history of the pertinent sections of the Bank-

ruptcy Act, and I am obliged to conclude that this federal District Court does not have jurisdiction of this action.

Having reached that conclusion, I need not discuss the second part of defendants' motions based on the defense of the Statute of Limitations. However, I wish to state that if this Court had jurisdiction of the action in a diversity of citizenship case, I would deny that motion because there are issues of fact that would have to be determined before the Court could decide which provisions [fol. 178] of the Statute of Limitations are applicable, when the various causes of action accrued, and whether the Statute of Limitations was tolled as to any of them. The allegations contained in paragraph A-20-A of the complaint charging the deliberate concealment of the facts in respect to the transactions described in the complaint, and certain other allegations of fact as to domination, control and duress would present those issues. This case should be tried, but this is not the proper forum with the complaint in its present form.

The motions of the defendants to dismiss the complaint for lack of jurisdiction of the action are granted. Settle orders on two days' notice.

Dated May 1st, 1946.

Vincent L. Leibell, United States District Judge.

[fol. 179] In United States District Court

[Same Title]

Order of Dismissal

Motions having been made herein by the defendants named hereafter for judgment pursuant to Rule 12(b) to dismiss this action on the ground that this Court lacks jurisdiction of the subject matter, or in the alternative for an order pursuant to Rule 56 for summary judgment in favor of said defendants on the ground that the transactions complained of are barred by the applicable State Statute of Limitations; said motions having been made by the defendants Harrison Williams, Clifford F. Stone, Albert E. Pardee and Clinton M. Finney, appearing thereon by Sullivan & Cromwell and Milton Pollack, their attorneys; and by the defendants Walter E. Sachs, Henry S. Bowers, Sydney J. Weinberg, John Foster Dulles and

Waddill Catchings, appearing thereon by Sullivan & Cromwell, their attorneys; and by the defendants James F. Fogarty and Herbert C. Freeman, appearing thereon by LeBoeuf & Lamb, their attorneys; and by the defendants John B. Niven, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, William C. Bechert and Jacob P. Friedman, appearing thereon by their attorneys, Hawkins, Delafield & Longfellow; and the said motions having regularly come on to be heard;

And judgments having heretofore been rendered herein vacating the service of process and dismissing the complaint, as amended, without prejudice and without costs on October 25, 1945 in favor of Howard J. Sachs, and on October 26, 1945, in favor of New Empire Corporation, Electric Investment Corporation, Federal Utilities, Inc., Utilities Securities Corporation, Onondaga Corporation, named herein as defendants, and against the plaintiffs herein;

And the following affidavits having been submitted on the motions based on the Statute of Limitations, viz., the [fol. 180] affidavits of Clifford F. Stone, Clinton M. Finney, Albert E. Pardee, Harrison Williams, Walter E. Sachs, Henry S. Bowers, Sydney J. Weinberg, Waddill Catchings, John Foster Dulles, James F. Fogarty, Herbert C. Freeman and Francis J. Clowes, in support of said motions, and the affidavit of Carl J. Austrian, in opposition thereto;

Now, on reading and filing the notices of said motion, dated October 1, 1945 and October 5, 1945, and on the complaint, as amended, filed herein, and after hearing Milton Pollack, Esq., Horace R. Lamb, Esq., and Barent L. Visscher, Esq., in support of the motions, and Carl J. Austrian, Esq., in opposition thereto, and due deliberation having been had;

And it appearing that the Court lacks jurisdiction of the subject matter of this action, and the Court's opinion thereon having been filed on May 1, 1946;

Now, on motion of said attorneys for the moving defendants, it is hereby

Ordered, that the said motions to dismiss this action pursuant to Rule 12(b) be granted and that this action be dismissed for want of jurisdiction of the subject mat-

ter and that a judgment to that effect shall be entered by the Clerk of this Court.

Dated: May 20, 1946.

Vincent L. Leibell, U. S. D. J.

Consented to as to form: Austrian & Lance. Milton Pollack, Sullivan & Cromwell. Sullivan & Cromwell. LeBoeuf & Lamb. Hawkins, Delafield & Longfellow.

[fol. 181] In United States District Court

[Same Titles]

Judgment of Dismissal for Lack of Jurisdiction Appealed From

Certain defendants having moved to dismiss this suit for want of jurisdiction of the subject matter, and the Court having found that it lacks jurisdiction of the subject matter, and the Court's order thereon having been filed on May 20, 1946, it is

Adjudged and Decreed that this action be and it hereby is dismissed for want of jurisdiction of the subject matter.

Judgment rendered this 22nd day of May, 1946.

William V. Connell, Clerk.

[fol. 182] In United States District Court

[Title omitted]

Notice of Appeal

Notice is hereby given that Carl J. Austrian and Robert G. Butcher, as Trustees of Central States Electric Corporation, plaintiffs above named, hereby appeal to the [fol. 183] Circuit Court of Appeals for the Second Circuit from the final judgment and decree entered in this action on the 22nd day of May, 1946.

Dated: June 19, 1946.

Austrian & Lance, By Carl J. Austrian, Attorneys for Carl J. Austrian and Robert G. Butcher, as Trustees of Central States Electric Corporation, Office & P. O. Address, 61 Broadway, New York, New York.

[fol. 184] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, September 12th, 1946.

Austrian & Lance, Attorneys for Plaintiffs-Appellants. Milton Pollack and Sullivan & Cromwell, Attorneys for Defendants-Appellees Harrison Williams, Clifford F. Stone, Albert E. Pardee and [fol. 185] Clinton M. Finney. Sullivan & Cromwell, Attorneys for Defendants-Appellees Walter E. Sachs, Henry S. Bowers, Sidney J. Weinberg, John Foster Dulles and Waddill Catchings. LeBoeuf & Lamb, Attorneys for Defendants-Appellees James F. Fogarty and Herbert C. Freeman. Hawkins, Delafield & Longfellow, Attorneys for Defendants-Appellees John B. Niven, Henry E. Mendes, Francis J. Clowes, Victor H. Stempf, Edwin H. Wagner, Sr., Robert C. Brown, William C. Bechart and Jacob P. Friedman. Ralph Jonas, Defendant-Appellee in Person. Louis E. Kilmarx, Defendant-Appellee in Person. Christian A. Johnson, Defendant-Appellee in Person. David H. McCornack, Defendant-Appellee in Person. John H. Eccles, Defendant-Appellee in Person. Cahill, Gordon, Zachry & Reindel, Attorneys for Defendant-Appellee Clarence F. Dillon. Otto A. Philipp, Defendant-Appellee in Person. Hugh B. Baker, Defendant-Appellee in Person.

[fol. 186] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 187] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT—OCTOBER TERM, 1946

No. 81

Argued November 4th, 1946. Decided December 10, 1946.

Docket No. 20348

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation, Plaintiffs-Appellants

v.

HARRISON WILLIAMS, et al., Defendants-Appellees.

Before: SWAN, AUGUSTUS N. HAND and CLARK, *Circuit Judges.*

Appeal from the District Court of the United States for the Southern District of New York.

Action by Carl J. Austrian and Robert G. Butcher, as trustees in reorganization of Central States Electric Corporation, against Harrison Williams and others, stockholders, officers, and directors of, or otherwise associated with, the debtor, for an accounting and other equitable relief for alleged breach of fiduciary duties and waste and misappropriation of the assets of the debtor. From an [fol. 188] order dismissing the action for lack of jurisdiction of the subject matter, D.C.S.D.N.Y., 67 F. Supp. 223, the plaintiffs appeal. Reversed and remanded.

CARL J. AUSTRIAN, of New York City (Austrian & Lance, and Saul J. Lance, George H. Schwartz, and Isadore H. Cohen, all of New York City, on the brief), *for appellants.*

MILTON POLLACK, of New York City (Sullivan & Cromwell, and Emery H. Sykes and William Piel, Jr., all of New York City, on the brief), for appellees Harrison Williams, *et al.* and Walter E. Sachs, *et al.*

HORACE R. LAMB, of New York City (LeBoeuf & Lamb and Craigh Leonard and James O'Malley, Jr., all of New York City, on the brief), *for appellees* James F. Fogarty and Herbert C. Freeman.

HAWKINS, DELAFIELD & LONGFELLOW, of New York City (Lewis L. Delafield, Barent L. Visscher, and Thomas A. Purcell, all of New York City, of counsel), *for appellees* John B. Nevin, *et al.*

ROGER S. FOSTER, Sol., ROBERT S. RUBIN, Asst. Sol., and Arnold R. Ginsburg and Lawrence M. Greene, Attys., all of Philodelphia, Pa., for the Securities and Exchange Commission, *amicus curiae*.

[fol. 189] CLARK, *Circuit Judge*:

Plaintiffs brought this action for the recovery of corporate assets in the Southern District of New York in their capacity of trustees of Central States Electric Corporation, a Virginia corporation now in reorganization in the District Court of the United States for the Eastern District of Virginia. To that court they owe their appointment, as well as authority to proceed against these former stockholders, officers, directors, and others accused of conspiring to defraud the debtor corporation. Except for certain defendants not served and others who have raised the issue of venue, the defendants all appear to be residents of the Southern District of New York. Jurisdiction is rested not upon diversity of citizenship, but upon the provisions of the Bankruptcy Act, hereinafter discussed, and of the Judicial Code, 28 U. S. C. §41(1)(19), referring to suits by an officer of the United States or arising under the Constitution or laws of the United States. On motion of defendants raising the issue, the District Court dismissed the action for want of jurisdiction of the subject matter, writing a well-reasoned opinion, D. C., S. D. N. Y., 67 F. Supp. 223, and plaintiffs have appealed.[1] The issue is of obvious importance in the administration of Chapter X of the Bankruptcy Act, and we have been aided by helpful briefs and arguments of the parties, as well as by a brief *amicus curiae* by the Securities and Exchange Commission urging reversal.

Section 2a of the Bankruptcy Act, 11 U. S. C. A. §11a, gives the district courts jurisdiction at law and in equity

[1] While not all defendants joined in the motion to dismiss, the court did dismiss the entire action, thus avoiding any question of appealability of the order, as in *Porter* v. *American Distilling Co.*, 2 Cir., Nov. 4, 1946.

in "proceedings" under the Act to "cause the estates of [fol. 190] bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto," except where otherwise provided in the Act.[2] So broad a grant of power would seem to confer extensive jurisdiction upon the United States courts for the collection of a bankrupt's assets, subject to the usual protective requirements as to service of process within the district and as to venue; and such has been the conclusion of text writers, supported by a holding under the earlier Bankruptcy Act. *Lathrop* v. *Drake*, 91 U. S. 516; 6 Collier on Bankruptcy, 14th Ed., §3.20, p. 672; Gilbert-Collier on Bankruptcy, 4th Ed. 1937, 63; Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act*, 52 Harv. L. Rev. 1, 21.

Defendants contend, however, that the word "proceedings" as used throughout the Act denotes only the summary proceedings whereby the court having charge of the

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[2] "§11 [§2]. Creation of courts of bankruptcy and their jurisdiction

"a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

. . . . . .

"(6) Bring in and substitute additional persons or parties in proceedings under this title when necessary for the complete determination of a matter in controversy;

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest."

debtor's estate administers the property under its control. "Proceedings" does not, under this view, include ordinary civil actions, such as the one at bar, to recover assets held [fol. 191] adversely under a claim of right. Because the grant of jurisdiction in §2a is limited to "proceedings" it would result that all of the numbered subdivisions following thereafter apply only to summary proceedings, and do not govern the case at bar. Under this view, the in personam jurisdiction of the bankruptcy courts springs from §23, 11 U. S. C. A. §46, which gives the district courts "jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this act," between trustees and claimants of property.[3] But this section is expressly made inapplicable to a reorganization proceeding unless an order is entered that bankruptcy be proceeded with. §102, 11 U. S. C. A. §502. The reason for excluding it from Chapter X, say defendants, was that reorganization is concerned not with collecting assets for distribution to creditors, but with administration and continuation of the debtor's business until the plan of reorganization can be put into effect. The jurisdiction of the district courts over ordinary civil suits was irrelevant to this function and was therefore eliminated. Indeed, defendants urge, §101, 11 U. S. C. A. §501, which provides that "the provisions of this chapter [X] shall apply exclusively to proceedings under this chapter," indicates a Congressional purpose to confine the application of Chapter X entirely to the summary, ad- [fol. 192] ministrative proceedings. Defendants find some

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[3] "§46 [§23]. Jurisdiction of controversies between receivers and trustees and adverse claimants

"a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this title, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

By §23b, suits can be prosecuted only in courts where the bankrupt could have brought them, unless by consent, and except for actions under §§ 60, 67, 70, as discussed below.

support for this technical view of the word "proceedings" in judicial statements such as those found in *Bardes* v. *Hawarden First Nat. Bank*, 178 U. S. 524, and *Schumacher* v. *Beeler*, 293 U. S. 367. These statements suggest that by an analogy drawn from the language of the Bankruptcy Act of 1867, §2 of the present Act is a grant of summary jurisdiction only.

The two cases apparently derived that conclusion from an interpretation of *Lathrop* v. *Drake*, *supra*, a decision which construed the Act of 1867 and which, it seems now clear, should not be so interpreted. It was there held that the jurisdiction of the district courts over civil suits came from §1 of that Act, which is now substantialy embodied in §2 of the present Act; and that §2 of the 1867 Act, now repealed, which the two former cases regarded as the source of jurisdiction over civil suits, merely conferred a concurrent jurisdiction upon the circuit courts. The former cases, moreover, were decided not under the Act of 1867, but under the Act of 1898; and they were concerned not with a construction of §2, but with the applicability of §23. The statements in them from which defendants claim support are therefore merely dicta, and do not sap the vitality of the jurisdictional holding in the early case. But, going beyond the historical analogies, however construed, we think it clear that on a true reading of the Act the word "proceedings" cannot be thus limited. For it is used elsewhere to describe ordinary civil actions or "plenary" suits, as they are sometimes called. This is true under §11e, 11 U. S. C. A. §29e, which authorizes trustees to "institute proceedings in behalf of the estate upon any claim," and contains also a reference to "any proceeding, judicial or otherwise," *Herget* v. *Central Nat. Bank & Trust Co.*, 324 U. S. 4; and under §§60b, 67e, and 70e(3) of the Act, [fol. 193] 11 U. S. C. A. §§96b, 103e, and 110e(3), each of which confers upon the district courts and upon state courts concurrent jurisdiction over certain "plenary proceedings." *Herget* v. *Central Nat. Bank & Trust Co.*, *supra*; *Schoenthal* v. *Irving Trust Co.*, 287 U. S. 92; *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426; *Bardes* v. *Hawarden First Nat. Bank*, *supra*; *Morrison* v. *Bay Parkway Nat. Bank*, 2 Cir., 60 F. 2d 41, certiorari dismissed *Lafayette Nat. Bank* v. *Morrison*, 296 U. S. 669; *Milkman* v. *Arthur*, 2 Cir., 223 F. 507; *Lowenstein* v. *Reikes*, 2 Cir., 54 F. 2d 481, cer-

tiorari denied 285 U. S. 539; *Coffey* v. *Managed Properties*, 2 Cir., 85 F. 2d 88. Moreover, the "except" clause in §2a(7) refers to §23, *Bardes* v. *Hawarden First Nat. Bank*, *supra*; *Bryan* v. *Bernheimer*, 181 U. S. 188, 191, a section in which the word "proceedings" is used, and which deals solely with the jurisdiction of the federal courts to entertain ordinary civil actions. *Thompson* v. *Terminal Shares*, 8 Cir., 104 F. 2d 1, 9, certiorari denied 308 U. S. 559. Obviously a section which deals with jurisdiction over civil actions can be an exception to another section only if that other section also deals with jurisdiction over civil suits. The jurisdiction granted by §§ 2a, 2a(6), and 2a(7) may be exercised by all the district courts, and not solely by the one in which the bankruptcy or reorganization petition was originally filed. Bankruptcy Act, §2a(20); *Babbitt* v. *Dutcher*, 216 U. S. 102; *Collett* v. *Adams*, 249 U. S. 545; *Mar-Tex Realization Corp.* v. *Wolfson*, 2 Cir., 145 F. 2d 360; *Lathrop* v. *Drake*, *supra*.[4]

We turn now to a consideration of §23, from which both parties assert they derive support. As construed together [fol. 194] with §2a(7), this section determines the jurisdiction of the district courts over civil actions brought by bankruptcy trustees appointed to liquidate estates under Chapters I to VII. In such ordinary bankruptcy proceedings a trustee can bring suit against an adverse claimant in a district court only if the defendant consents to the suit or if the bankrupt himself could have brought the suit had the bankruptcy petition not been filed. *Bardes* v. *Hawarden First Nat. Bank*, *supra*; *Schumacher* v. *Beeler*, *supra*; *Gins* v. *Mauser Plumbing Supply Co.*, 2 Cir., 148 F. 2d 974. If jurisdiction is claimed on the ground of diversity of citizenship, for example, the citizenship of the bankrupt, and not the citizenship of the trustee, is decisive. *Stiefel* v. *14th St. & Broadway Realty Corp.*, 2 Cir., 48 F. 2d 1041. The same result obtained in reorganizations conducted

[4] Similarly, defendants' contention that Chapter X embraces only administrative proceedings in rem is not well taken. Under such a view, § 102 would be rendered meaningless, as purporting to prevent a section dealing solely with jurisdiction in personam from affecting proceedings in rem.

under the old §77B, 11 U. S. C. A. §207 (b), to which the section remained applicable. *In re Standard Gas & Electric Co.*, 3 Cir., 119 F. 2d 658; 2 Gerdes on Corporate Reorganizations, 1936, §906, p. 1470. In some cases to which both §§2a (7) and 23 were applicable, courts have characterized one or the other of them as a grant of jurisdiction or as a limitation on jurisdiction. In *Whitney* v. *Wenman*, 198 U. S. 539, the latter section was characterized as a limitation; in *Schumacher* v. *Beeler, supra*, a later case, it was characterized as a grant. Such characterizations of §23 alone did not control these decisions, since they were based on a construction of the two sections standing together. Here, where that section is not involved, the characterizations of it are not in point; unless Congress has indicated an intention to the contrary, §2a(7), standing alone, must be construed in accordance with its plain wording.

Chapter X was enacted largely because of the many abuses which developed in reorganizations under §77B. One of these was the retention of control over the debtor [fol. 195] corporation during reorganization by "insiders" who frequently sought to conceal and to prevent rigorous prosecution of possible causes of action against the debtor's former management. Report on Protective and Reorganization Committees, Pt. 1, S. E. C., 1937, 865; N. Y. Leg. Doc. No. 66, 159th Sess., 1936, 22; Note, 50 Yale L. J. 1492, 1496. To combat this and other abuses the draftsmen of Chapter X strengthened the hand of the reorganization trustee by giving him access to lists of the debtor's security holders, in whosoever hands they may be, §165, 11 U. S. C. A. §565, by placing upon him the duty of formulating the plan of reorganization, §169, 11 U. S. C. A. §569, and perhaps most important, by giving him broad powers of scrutiny of the conduct of the debtor's business by the debtor's former management, §167, 11 U. S. C. A. §567. In view of the Congressional purpose demonstrated by these provisions, it seems clear that, in eliminating §23 from corporate reorganizations under Chapter X, Congress intended to enlarge, rather than restrict, the trustee's choice of forum in prosecuting causes of action against former controllers of the debtor. This is the view of Professor

Moore and of Mr. Gerdes.* 6 Collier on Bankruptcy, 14th Ed., ¶3.20 (containing specific criticisms of the opinion of the district court); 2 *id.*, ¶2.12; Moore's Bankruptcy Manual, 1939, 494; Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act*, 52 Harv. L. Rev. 1, 21.

Since jurisdiction results from the provisions of the Bankruptcy Act, we need not discuss the claim of jurisdiction based on the Judicial Code.

—Reversed and remanded.

[fol. 196] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of December one thousand nine hundred and forty-six.

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

CARL J. AUSTRIAN & ROBERT G. BUTCHER, as Trustees, etc., Plaintiffs-Appellants,

v.

HARRISON WILLIAMS, et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs, and cause

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* Mr. Gerdes seems to have been influential in urging the amendment eliminating this section from Chapter X. See Hearings before a Sub-committee of the Committee on the Judiciary, U. S. Senate, on H. R. 8046, 75th Cong., 2d Sess., 76, 77.

remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 197] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Carl J. Austrian & Robert G. Butcher, etc. v. Harrison Williams, et al., 81 Judgment. United States Circuit Court of Appeals, Second Circuit. Filed December 10th, 1946. Alexander M. Bell, Clerk.

[fol. 198] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 196] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 850

ORDER ALLOWING CERTIORARI—Filed February 10, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM 1946

No. 850

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN E. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORNACK, JOHN H. LOCLES, CLARENCE F. DILLON, OTTO A. PHILIPP and HUGH B. BAKER,

Petitioners,

against

KARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

MILTON POLLACK,
EMERY H. SYKES,
HORACE R. LAMB,
LEWIS L. DELAFIELD,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM—1946.

No.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORNACK, JOHN H. ECCLES, CLARENCE F. DILLON, OTTO A. PHILIPP and HUGH B. BAKER,

Petitioners,

—against—

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners respectfully show:

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 10, 1946. Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 187) is not yet reported. The opinion of the District Court (R. 163) is reported in 67 F. Supp. 223.

Statutes Involved.

The pertinent statutory provisions are set forth in the appendix, *infra*, pages 20-22.

Summary Statement of the Matter Involved.

This is a civil suit for an accounting and other relief brought in the Southern District Court of New York. The respondents-plaintiffs are trustees appointed in reorganization proceedings of Central States Electric Corporation pending in the District Court of Virginia under Chapter X of the Bankruptcy Act. The Virginia District Court authorized its trustees to bring this suit (R. 5). No "property" is involved. The petitioners-defendants were directors, officers, stockholders of, or otherwise connected in the complaint with the debtor. The claims asserted by the respondents-plaintiffs are alleged breach of fiduciary duties and waste and misappropriation of the assets of the debtor many years before the petition for reorganization was filed. The transactions complained of occurred from 16 to 28 years before this suit was commenced, except only one transaction, which occurred seven years previously.

Diversity of citizenship is not alleged. Jurisdiction is rested by the complaint, not upon diversity of citizenship, but upon the Constitution, the provisions of Sections 2a and 115 of the Bankruptcy Act and of Sections 24(1) and (19) of the Judicial Code.

The petitioners-defendants moved to dismiss the suit for want of federal jurisdiction.

The District Court, in an opinion styled by the Circuit Court of Appeals as "well reasoned" (R. 189), relying principally upon two decisions of this Court, *Bardes* v. *Hawarden First Nat. Bank*, (1900) 178 U. S. 524; *Schumacher* v.

Beeler, (1934) 293 U. S. 367, dismissed the suit holding that trustees under Chapter X may bring such a plenary action against adverse claimants in a district other than the reorganization district only if they meet the usual requirements for federal jurisdiction, *viz.*, diversity or other federal ground.

The Circuit Court of Appeals reversed the District Court, avowedly rejecting the authority of these two decisions of this Court on the ground that they erroneously interpreted an earlier case, which passed on the Act of 1867, (*Lathrop* v. *Drake*, [1875] 91 U. S. 516), or as *dicta* not any longer to be followed. The Circuit Court of Appeals held that diversity of citizenship was not necessary; that the enactment of Chapter X enlarged federal jurisdiction to include as "proceedings" in bankruptcy, of which the District Courts as Courts of Bankruptcy are given jurisdiction by Section 2a of the Bankruptcy Act, all plenary suits brought by trustees against adverse parties; and that federal jurisdiction thereof can be exercised irrespective of diversity, by any of the district courts of the United States, and not solely by the one in which the bankruptcy or reorganization petition was filed.

The Circuit Court of Appeals did not discuss the respondents' claim of jurisdiction based on the Judicial Code. The respondents-trustees contended that by their appointment they had become officers of the United States within the meaning of Judicial Code Section 24(1) and that in consequence, their appointment as such trustees makes any suit by them a suit arising under federal law and confers original jurisdiction thereof on any of the district courts. Judicial Code Section 24(1).

Questions Presented.

The precise question before this Court is whether, in the absence of diversity of citizenship, federal jurisdiction exists to entertain a plenary suit by a Chapter X trustee against adverse claimants to recover on an ordinary state-created civil claim for money in a district court other than that wherein the reorganization is pending.

The answer depends on a number of subsidiary questions:

1. Are such plenary suits "proceedings under this Act" within the meaning of Section 2a of the Bankruptcy Act?

2. Is Section 2a of the Bankruptcy Act, including Subdivision 2a(7), a grant of jurisdiction solely over summary proceedings in bankruptcy?

3. Does Section 115 of the Bankruptcy Act, conferring equity receiver's powers on the reorganization court, give federal jurisdiction to every district court to entertain such a plenary suit for money against adverse claimants, in the absence of diversity of citizenship?

4. Are such trustees officers of the United States within Judicial Code Section 24(1) and is every plenary suit wherever brought by such trustees one arising under the Constitution and laws of the United States within the meaning of Judicial Code Section 24(1)?

Reasons for Granting the Writ.

1. The decision below construes a recent statute, Chapter X of the Bankruptcy Act, relating to reorganization of corporations, as a grant and expansion of federal jurisdiction to all the district courts and not solely to the one where the petition was filed. The Court below held that any of the district courts have federal jurisdiction over plenary suits involving ordinary common law, or state-created civil claims by Chapter X trustees against adverse claimants, irrespective of diversity of citizenship. This is an important question of federal law which has not been passed on by this Court since enactment of Chapter X but should be settled by this Court. The issue is of first impression and is of such gravity and general importance in the interests of uniform and proper application of said statute and of marking out

limits of federal jurisdiction as urgently to require review by this Court.

2. The decision below constitutes a far-reaching innovation in the law of federal jurisdiction.

The decision of the Circuit Court of Appeals if permitted to stand, would loose on federal courts a veritable flood of ordinary plenary civil suits on state-created claims, involving no "property" of the debtor, merely because the owner of such claims has submitted to reorganization under Chapter X and irrespective of amount involved, diversity of citizenship or other federal ground. Upon occurrence of reorganization proceedings, the ordinary business of local courts would thereafter be administered by federal courts all over the country without any apparent advantage to the administration and purposes of Chapter X of the Bankruptcy Act. The local courts are and for almost 50 years have been an adequate forum for such local claims. The Congressional policy has been declared by this Court to "leave such controversies to be heard and determined for the most part in State courts 'to the greater economy and convenience of litigants and witnesses.'" *Schumacher* v. *Beeler*, 293 U. S. 367, 374.

The Circuit Court of Appeals itself has said that

> "The issue is of obvious importance in the administration of Chapter X of the Bankruptcy Act * * *." (R. 189).

The United States Securities and Exchange Commission filed briefs below *amicus curiae* stating that it did so

> "because of the importance of this question in the field of corporate reorganizations."

The decision below holds (R. 192) that a plenary suit on state-created rights is within the meaning of "proceedings under this [the Bankruptcy] Act" as employed in Section 2a of the Bankruptcy Act. Since proceedings in bankruptcy are the exclusive concern of federal courts, the holding below necessarily ousts all state courts from jurisdiction over plenary suits by a Chapter X trustee. Moreover, because no absolute right thereto exists in bankruptcy admin-

istration, litigants would necessarily be deprived of the right to a jury trial of ordinary civil claims.

3. The decision below avowedly departs from the construction placed upon Section 2a of the Bankruptcy Act by this Court in two decisions 34 years apart and rendered since enactment of the law. As recently as December 9, 1946, this Court cautioned that "bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court * * *." *Vanston* v. *Green, (Inland Gas Corporation)* — U. S. —. The decision below is in conflict with the interpretations of Section 2a of the Bankruptcy Act made by this Court in *Bardes* v. *Hawarden*, (1900) 178 U. S. 524; *U. S. Fidelity Co.* v. *Bray*, (1912) 225 U. S. 205, 216; *Schumacher* v. *Beeler*, (1934) 293 U. S. 367; *Pepper* v. *Litton*, (1939) 308 U. S. 295, 304, which state that Section 2a of the Bankruptcy Act is a grant of *summary* jurisdiction only, relating only to bankruptcy proceedings or to controversies in such proceedings, on the one hand as distinguished from controversies at law or in equity, on the other hand.

4. The Court below has declared that decisions of this Court are in conflict *inter sese*. The Circuit Court of Appeals has examined the interpretation of *Lathrop* v. *Drake*, (1875) 91 U. S. 516, made by this Court in the later cases of *Bardes* v. *Hawarden First National Bank*, (1900), *supra* (Opinion by Gray, *J.*), *and Schumacher* v. *Beeler*, (1934), *supra* (Opinion by Chief Justice Hughes). Referring to the later interpretative Supreme Court decisions, the opinion of the Circuit Court of Appeals states that "it seems now clear" that *Lathrop* v. *Drake* "should not be so interpreted" (R. 192). Founding an important jurisdictional decision on a supposed misunderstanding by this Court of its own prior decision creates uncertainty and confusion in the construction and application of the Bankruptcy Act and urgently suggests that this Court should consider and announce whether its repeated interpretations of its prior decision, rejected by the Circuit Court of Appeals, should be adhered to.

5. The decision below construes Section 23 of the Bankruptcy Act not as an independent grant of jurisdiction apart from any other provision, but as a limitation of the jurisdiction granted to the district courts by Section 2a and is in conflict with the decision of this Court in *Schumacher v. Beeler, supra*, wherein Chief Justice Hughes stated that "Section 23(b) was thus in effect a grant of jurisdiction * * *" (p. 374).

6. The issue raised concerning the scope of Judicial Code Section 24(1) is novel and of first impression in this Court. The Securities and Exchange Commission stated in its brief *amicus curiae* in the Court below (p. 36):

> "To the best of our knowledge the present case is the first one where a court has been called upon to decide whether a plenary action brought by a Chapter X trustee is one brought by an officer of the United States within the meaning of Section 24(1) of the Judicial Code."

7. The decision of the said Circuit Court of Appeals is in probable conflict with decisions of every other Circuit Court of Appeals, construing ordinary federal jurisdiction of the district courts under the Bankruptcy Act, e.g., *Operators' Piano Co. v. First Wisconsin T. Co.* (1922, CCA 7th), 283 F. 904, and under analogous statutes dealing with reorganization (Sections 77 and 77(B) of the Bankruptcy Act), *viz., In re Standard Gas & Electric Co.* (1941, CCA 3rd), 119 F. (2d) 658; *In re Prima* (1938, CCA 7th), 98 F. (2d) 952, cert. den. sub nom *Keig v. Harris Trust & Savings Bank*, 305 U. S. 658; *Thompson v. Terminal Shares* (1939, CCA 8th), 104 F. (2d) 1, cert. den. 308 U. S. 559.

Wherefore, petitioners pray that a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted.

Dated: January 2, 1947.

MILTON POLLACK,
EMERY H. SYKES,
HORACE R. LAMB,
LEWIS L. DELAFIELD,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The grounds upon which the jurisdiction of this Court is invoked, the opinions below, a statement of the facts involved and the questions presented appear in the accompanying petition, and, for the sake of brevity, are not here repeated.

POINT I.

DIVERSITY OF CITIZENSHIP IS REQUISITE IN A PLENARY SUIT AGAINST ADVERSE PARTIES IN A DISTRICT WHERE REORGANIZATION IS NOT PENDING.

The petitioners contend that diversity of citizenship is requisite to federal jurisdiction herein and that Section 2a(7) of the Bankruptcy Act does not confer such jurisdiction.

A plenary suit on state-created rights is not a proceeding in bankruptcy within Section 2a or 2a(7) of the Bankruptcy Act. (*Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524; *Schumacher* v. *Beeler* (1934), 293 U. S. 367.)

The opinion and decision below in essence hold that diversity of citizenship is not requisite in such a plenary suit and that such a suit is a proceeding in bankruptcy within Section 2a(7), and that this Court's decisions to the contrary are erroneous (R. 195).

The jurisdiction granted by Section 2a including 2a(7) of the Bankruptcy Act is exclusively federal. Judicial Code, Section 256 (as am.) "Sixth"; *U. S. Fidelity & G. Co.* v. *Bray* (1912), 225 U. S. 205; *Pepper* v. *Litton, supra*, at p. 304, ftn. 8. The claims in this suit are traditionally and unquestionably cognizable by the state courts: *Kidder* v. *Horrobin, et al.* (1878), 72 N. Y. 159; *Hastings* v. *Byllesby & Co.* (1941), 286 N. Y. 468. Thus this suit is not within the purview of Section 2a of the Bankruptcy Act.

In *U. S. Fidelity & G. Co.* v. *Bray* (1912), 225 U. S. 205, 217, this Court said after quoting Sections 2a and 2a(7) of the Act of 1898:

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, *the reduction of the estates to money*, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them." (Italics supplied.)

The jurisdiction granted by Section 2a in all subdivisions, is summary only. *Bardes* v. *Hawarden First National Bank*, *supra*; *Schumacher* v. *Beeler*, *supra*; *Pepper* v. *Litton*, *supra*. The fact that by Section 2 a court of bankruptcy may exercise the jurisdiction granted by Section 2a "in vacation, in chambers, * * *" is indicative of a summary, not plenary jurisdiction. *Smith* v. *Mason* (1871), 14 Wall. 419. This is a plenary suit. *Park* v. *Cameron* (1915), 237 U. S. 616. Thus this suit is not within the purview of Section 2a of the Bankruptcy Act or of any of its subdivisions.

Section 2 of the Bankruptcy Act grants jurisdiction over all proceedings in bankruptcy. The 21 enumerated subdivisions list types of proceedings which fall within this concept. Each of the 21 subdivisions affords summary jurisdiction to the Bankruptcy Court. The Bankruptcy Act did not intrude a plenary jurisdiction into Section 2a(7), which is but one of 21 subdivisions all of which provide for exclusively summary jurisdiction.

This plan of the Bankruptcy Act is implicitly recognized by the statute enacting Chapter X (Chandler Act, 1938). By the simple expedient of adding subdivision 21 to Section 2a of the Bankruptcy Act certain suits, formerly plenary, became summary proceedings (*Emil* v. *Hanley* (1943), 318 U. S. 515, 519).

Thus, under Section 2a(7), the Bankruptcy Court may in summary fashion deal with a trustee's petition for permis-

sion to sue adverse claimants in a foreign district, and by summary determination (as in this case) direct the trustee to sue and thereby "cause" the claim to be collected and reduced to money. Again, when the claim has been reduced to the possession of the Bankruptcy Court by the trustee, that Court may in summary fashion determine any controversies in the bankruptcy proceedings themselves.

An ordinary law suit in a district court, other than that court where a petition for reorganization is filed under Chapter X of the Bankruptcy Act, between a trustee and adverse parties on state-created rights is not, as held below, a proceeding in bankruptcy. It is a plenary suit as between party and party and subject to the requirements for federal jurisdiction imposed by the Judicial Code of diversity of citizenship and requisite amount. Jurisdiction of such suits is preserved to state courts except where the federal court is just another local court because of diverse citizenship.

The Bankruptcy Act itself creates two categories, *viz.*, "proceedings" (or "controversies" in such proceedings), on the one hand, over which the Court has summary jurisdiction, and "controversies at law and in equity, as distinguished from proceedings under this Act", on the other hand, which are subject only to a plenary jurisdiction (Sections 2, 23, 24, 25).

Analysis of the Act of 1898, as originally enacted, shows conclusively the mutually exclusive treatment of the summary jurisdiction in bankruptcy proceedings and incidental controversies therein, from the separate provisions for jurisdiction of plenary suits involving controversies at law and in equity between the trustee and adverse parties, strangers to the proceedings.

Section 23 as originally enacted in 1898 provided:

> "JURISDICTION OF UNITED STATES AND STATE COURTS. (a) The United States *circuit* courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concern-

> ing the property acquired or claimed by the trustees, in the same manner and to the same extent *only as though bankruptcy proceedings had not been instituted* and such controversies had been between the bankrupts and such adverse claimants." (Italics supplied.)

Section 23(a) thus required the preexistence of federal jurisdiction under the Judicial Code and, therefore, did not deal with a grant of jurisdiction like that in Section 2. Section 23(a) merely preserved jurisdiction afforded under the Judiciary Act of 1789 as between party and party.

Section 23 further provided:

> "(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Section 23(b) did not affect the distribution of power between state and federal courts. It preserved to debtors of the bankrupt their state rights but it permitted such debtors to consent to federal jurisdiction.

Ordinarily jurisdiction cannot be conferred by consent even by Act of Congress. However,

> "The Congress by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. * * * Exercising that power, the Congress prescribed in Section 23b the condition of consent on the part of the defendant sued by the trustee. Section 23b was thus in effect a grant of jurisdiction subject to that condition." (*Schumacher* v. *Beeler*, *supra*, p. 374.)

Thus, Section 23(b) operates as a grant of a consent jurisdiction, which the Court could not otherwise exercise.

Later, when the courts of bankruptcy were given a jurisdiction concurrent with that of the state courts to entertain plenary suits under Sections 60, 67 and 70 of the Bankruptcy Act relating to fraudulent transfers and preferences, Section 23(b) was also amended by eliminating the requirement for consent in such suits. *Taubel Co.* v. *Fox* (1924) 264 U. S. 426, 433-4. The grant of jurisdiction over the plenary suits so excepted together with the grant of federal jurisdiction in cases of the debtor's consent mark the limit of federal jurisdiction over plenary suits against adverse parties under the Bankruptcy Act. The implication from these express grants of federal plenary jurisdiction fortifies the conclusion drawn from its own terms that a grant of similar jurisdiction is excluded from Section 2 of the Bankruptcy Act.

The distinction between and separate treatment of the summary jurisdiction and of the plenary jurisdiction of the courts follows an historical pattern.

The Act of 1841 (5 Stat. 445) specifically provided in Section 6 that jurisdiction in bankruptcy proceedings was "to be exercised summarily in the nature of summary proceedings in equity." The Act of 1867 (14 Stat. 517) continued the same concept. The jurisdiction in bankruptcy proceedings under Section 1 of that Act was to be exercised in the same manner that circuit courts proceeded in equity, *i.e.*, in summary fashion. *Smith* v. *Mason* (1871), 14 Wall. 419; *Marshall* v. *Knox* (1872), 16 Wall. 551.

In contrast with the provision for summary jurisdiction, the Act of 1841 provided separately in Section 8 thereof (5 Stat. 446) for concurrent jurisdiction in the district and circuit courts of plenary suits, *i.e.*, "all suits at law and in equity which may and shall be brought by an assignee of the bankrupt" against adverse parties. Similarly, the Act of 1867, in Section 2 (14 Stat. 518), provided separately for like concurrent jurisdiction. *Morgan* v. *Thornhill* (1870), 11 Wall. 65; *Wiswall* v. *Campbell* (1876), 93 U. S. 347; *Schumacher* v. *Beeler*, *supra*.

The distinction between and separate treatment of the summary and plenary jurisdictions was not lost sight of in the Act of 1898 in enacting Sections 2 and 23 of that Act. *Bardes* v. *Hawarden First Nat. Bank, supra; Schumacher* v. *Beeler, supra.*

The plenary jurisdiction referred to in Section 23 of the Act of 1898 was different from that granted in the previous acts in failing to afford concurrent jurisdiction and restricting the plenary jurisdiction to the circuit court alone. *Bardes* v. *Hawarden First National Bank, supra;* 30 Congressional Record 601. Until the circuit court was abolished in 1911 plenary suits could not be brought in the district court. Only the circuit court had jurisdiction as between trustees and adverse claimants and this jurisdiction rested on and was subject to the requirements of the Judicial Code, as if bankruptcy had not intervened. During the same period the district courts, on the other hand, had original and exclusive jurisdiction of bankruptcy proceedings, exercisable summarily. The district courts as such, and not as courts of bankruptcy, have since 1911 inherited the jurisdiction formerly exercised by the circuit court. The traditional jurisdiction of district courts as courts of bankruptcy, however, is in *rem*, a summary jurisdiction. *Taubel Co.* v. *Fox* (1924), 264 U. S. 426.

Thus the plan of the Act of 1898 was clear. Of the two federal courts only the circuit court had jurisdiction of controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees and adverse parties, and it had that jurisdiction only in those cases in which federal jurisdiction otherwise existed and that jurisdiction was necessarily one enjoyed not exclusively but concurrently with the state courts. Judiciary Act of 1789; Bankruptcy Act, Section 23(a). On the other hand, the district courts as courts of bankruptcy had original and exclusive jurisdiction of bankruptcy proceedings, exercisable in summary fashion. Bankruptcy Act, Section 2.

The legislative history of the Act of 1898 shows that Section 2 was never thought of as being concerned with ordinary

civil litigations. 30 Congressional Record, p. 601, *et seq.* The desire to restrict federal jurisdiction was clearly manifest. 31 *id.*, pp. 1785, 6433.

This Court has clearly held that Section 2 does not embrace civil actions at law or plenary suits in equity. *Bardes v. Hawarden First National Bank, supra*, page 535:

> "The section (2) nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of incidental powers * * *."

In the discussion of the bill which emerged as the Act of 1898, the Chairman of the Judiciary Committee stated as follows, 31 Congressional Record, p. 1785:

> "The jurisdiction of state courts to try controversies between the trustees of bankrupt estates and parties claiming adverse interest is not in any way interfered with * * *. Under the last bankruptcy law the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was a great inconvenience and much expense * * *. Such will not be the effect under this bill."

It is thus clear from the plain language of the statute, the historical and legislative background and the decided cases, that Sections 2 and 23 of the Act of 1898 refer to basically different jurisdictions and that Section 2 does not embrace this type of suit.

POINT II.

CHAPTER X OF THE ACT OF 1898 AS AMENDED DID NOT ENLARGE SECTION 2 TO INCLUDE PLENARY AS WELL AS SUMMARY JURISDICTION.

By the terms of Section 101, Chapter X relates solely to "proceedings under this chapter" (in reorganization). Chapter X nowhere in terms deals with plenary suits by the trus-

tee as distinguished from reorganization "proceedings". The specific grant of jurisdiction applicable to Chapter X matters is found in Section 114 of the Bankruptcy Act which restricts jurisdiction to the court where the petition is filed, or to the court to which the petition is transferred. Section 118. The definitions in the Act of "the court" dispel all doubt on this point. Sections 1(9), 102.

Section 102 of the Bankruptcy Act incorporates the general provisions of the Act in Chapter X except inconsistent or conflicting provisions, and specifically withdraws Section 23 from application to reorganization proceedings unless bankruptcy is ordered upon failure to consummate a plan for reorganization.

The court below found no basis for federal jurisdiction of this suit within the jurisdictional provisions peculiarly applicable to Chapter X. (Sections 114, 118.) It had to rest its finding of federal jurisdiction solely on Section 2 as imported into Chapter X by Section 102 and stated "it seems clear that in eliminating § 23 from corporate reorganizations under Chapter X, Congress intended to enlarge, rather than restrict, the trustee's choice of forum * * *." (R. 195). The court below reasoned that because greater power of scrutiny was granted to a Chapter X trustee (Sections 165, 167) and because he has the duty to formulate a plan of reorganization (Section 169) therefore, the elimination of Section 23 was intended to enlarge the scope of federal jurisdiction under Section 2 to include plenary jurisdiction to "be exercised by all the district courts, and not solely by the one in which the bankruptcy or reorganization petition was originally filed" (R. 193).

There is nothing in the legislative history of the 1938 amendments to the Act of 1898 (Chapter X) to show any intention of Congress to enlarge the scope of federal jurisdiction. The nation-wide property jurisdiction of the domiciliary court over property of the debtor was a modification of venue requirements and not a grant of a new federal jurisdiction (Section 111).

The concern of Congress in enacting the Act of 1898 had been to limit and restrict the scope of federal jurisdiction. No evidence appears in the legislative history that deviation from that attitude was intended in 1938 or that the distribution of power over state-created rights as between state and federal courts generally, was being realigned.

Section 23 was obviously irrelevant to the purposes of Chapter X. The concern of Chapter X is with "proceedings" (Section 101) to reorganize the debtor. On the other hand, Section 23 is not concerned with administration of property nor proceedings to reorganize the debtor; it is concerned with liquidation. It was because of these differences in purpose and not to enlarge the jurisdiction of the federal courts that Section 23 was specifically designated as one of the sections of the Bankruptcy Act not incorporated in Chapter X.

The plan of Chapter X was to give the trustee powers necessary to effect reorganization in the domiciliary court by "proceedings" (Section 114) and to give him power to deal in that court with matters *in personam* in his capacity as an equity receiver (Section 115). When reorganization efforts fail and liquidation is ordered, the trustee is given an additional aid for liquidation by the grant of jurisdiction under Section 23.

The grant of equity receivership powers (Section 115) to the reorganization court may have been deemed by some in Congress to be inconsistent with Section 23(b). Some law writers (2 *Gerdes on Corporate Reorganization*, p. 1478) and courts* thought the inconsistency existed because of the power of an equity receiver as distinguished from a trustee in bankruptcy to litigate plenary claims in his home court, irrespective of diversity. This power followed from the equity court's property jurisdiction and control. This presumed inconsistency with Section 115 may have been a basis of elim-

* The C. C. A. 3 Cir. held otherwise as to comparable provisions in former Sec. 77-B of the Bankruptcy Act in *In re Standard Gas & Electric Corp.*, 119 F. 2d 658; as did also the C. C. A. 7 Cir. in *In re Prima Co.*, 98 F. 2d 952, cert. den. 305 U. S. 658. *Cf. Warder v. Brady* (C. C. A. 4 Cir.), 115 F. 2d 89.

inating Section 23 from Chapter X. But surely Section 23 was not thought by the Congress to be inconsistent with Section 2; both sections had been in the same statute for 40 years.

While, indeed, Chapter X accords equity receivership powers to the home court, the court's trustee-receiver was not thereby granted access, by reason of his office, to other district courts generally, nor were the limits of jurisdiction of such other courts broadened.

An equity receiver was never afforded access to federal courts other than the domiciliary court, merely by reason of his office, for the purpose of bringing plenary suits *in personam*.

> *Gableman* v. *Peoria D. & E.* (1900), 179 U. S. 335;
> *Barfield* v. *Zenith T. & R.* (1924, N. D. Ohio), 9 F. 2d 204;
> *Kelley* v. *Queeney* (1941, W. D. N. Y.), 41 F. Supp. 1015.

Neither is a general bankruptcy trustee afforded access to federal courts other than the domiciliary court to bring plenary suits *in personam* in the absence of diversity of citizenship.

> "* * * the mere fact that plaintiff was trustee in bankruptcy did not give jurisdiction." (*Spencer* v. *Duplan Silk Co.* (1903), 191 U. S. 526, 531.)

A Chapter X trustee has no need for greater access to federal courts to collect debts than that accorded to a bankruptcy trustee. The prime function of a bankruptcy trustee is to liquidate, collect and distribute. The reorganization trustee's purpose is not primarily liquidation but to maintain the *status quo* and to realign interests.

The state courts afford an adequate forum and have been employed for such suits as this (*Hastings* v. *Byllesby & Co.* (1941), 286 N. Y. 468).

In view of *Erie* v. *Tompkins*, (1938), 304 U. S. 64, requiring that state law be applied to state-created rights, the trustee would gain nothing by federal jurisdiction over such suits as these. The quest for a competitive forum to institute litigation on state-created rights should have ended since the decision of that case, and no presumed policy of Chapter X is fostered by a federal forum for suits such as this.

The general consequence of the decision made by the Circuit Court of Appeals on the scope of federal jurisdiction transcends this particular suit and seems not to have been appraised by the lower court and is not adverted to in the opinion below. Under the lower court's holding every $20 claim against adverse parties by a bankrupt undergoing reorganization would come within federal jurisdiction irrespective of the fact that such adverse parties may be located in any of the 47 states other than that where the reorganization is pending. To bring such claims within general federal jurisdiction the lower court has classified them as "proceedings" in bankruptcy. As we have shown above the consequence is to make the jurisdiction of any federal court *exclusive* over such claims. (Judicial Code, Section 256 [as am.] "Sixth"). The further consequence is to deprive the defendant of the right to a jury trial, which in bankruptcy proceedings is restricted largely to the issue of insolvency. Section 19, Bankruptcy Act.

The federal district courts have not had such a large grant of federal jurisdiction as is given by the decision below since the repeal of the Act of 1867.

POINT III.

THE JUDICIAL CODE DOES NOT CONTAIN A GRANT OF FEDERAL JURISDICTION OVER THIS SUIT.

1. No federal question is involved in this suit. This suit does not arise under the laws of the United States but seeks

to enforce a state-created claim which existed apart from bankruptcy. The trustee's right to sue was inherited from the debtor and the bankruptcy reorganization created no new substantive rights. The alleged misconduct is not condemned either by the Constitution or by federal statute. The fact that the respondents are trustees is not an essential element on which the result will turn. *Spencer* v. *Duplan Silk Co.* (1903), 191 U. S. 526, 530; *Gully* v. *First National Bank* (1936), 299 U. S. 109.

2. Plaintiffs are not officers of the United States within the meaning of Section 24(1) of the Judicial Code. This is a private controversy in which no interest of the United States is at stake. The cases involving receivers of national banks do not apply. Such receivers are officers of the executive branch of the government and are not officers of the court. *Wittnebel* v. *Loughman*, 9 F. Supp. 465, 467; aff'd 80 F. 2d 222; cert. den. 297 U. S. 716; *Cf. Wheeler* v. *Greene* (1929), 280 U. S. 49, 51; *Oosterhuis* v. *Palmer*, 137 F. 2d 322, 325.

CONCLUSION.

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers by writ of certiorari.

Dated: January 2, 1947.

Respectfully submitted,

MILTON POLLACK,
EMERY H. SYKES,
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LEWIS L. DELAFIELD,
Counsel for Petitioners.

APPENDIX.

Statutes Involved.

The BANKRUPTCY ACT OF 1898, as amended, provides:

Sec. 1(9); 11 U. S. C. A. § 1(9)

"Meaning of Words and Phrases.—The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * *

"(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending; * * *"

Secs. 2a and 2a(7); 11 U. S. C. A. §§ 11 and 11a(7)

"Creation of Courts of Bankruptcy and Their Jurisdiction.—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to— * * *

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; * * *"

Sec. 23; 11 U. S. C. A. § 46

"Jurisdiction of United States and State Courts.—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or

claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in §§ 60, 67, and 70 of this Act."

Sec. 101; 11 U. S. C. A. § 501

"The provisions of this chapter shall apply exclusively to proceedings under this chapter."

Sec. 102; 11 U. S. C. A. § 502

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That § 23, subdivisions h and n of § 57, § 64, and subdivision f of § 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under § 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered."

Sec. 111; 11 U. S. C. A. § 511

"Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Sec. 114; 11 U. S. C. A. § 514

"Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication."

Sec. 115; 11 U. S. C. A. § 515

"Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

The JUDICIAL CODE, as amended, provides:

Sec. 24(1) (in part); 28 U. S. C. A. § 41(1) (in part)

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, * * *"

Sec. 24(19); 28 U. S. C. A. § 41(19)

"The district courts shall have original jurisdiction as follows:

"Nineteenth. Of all matters and proceedings in bankruptcy."

Sec. 256(Sixth); 28 U. S. C. A. § 371(Sixth)

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: * * *

"Sixth. Of all matters and proceedings in bankruptcy."

FILE COPY

Argued by
MILTON POLLACK.

MAR 15 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 850.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORMACK, JOHN H. ECCLES, CLARENCE F. DILLON, OTTO A. PHILLIPP and HUGH B. BAKER,

Petitioners,

—against—

CARL J. AUSTERIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

MILTON POLLACK,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 850.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. MCCORNACK, JOHN H. ECCLES, CLARENCE E. DILLON, OTTO A. PHILLIPP and HUGH B. BAKER,

Petitioners,

—against—

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York (R. 127) is reported at 67 F.

Supp. 223. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 142) has not yet been reported.

Grounds of Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit (R. 149) reversing a judgment of the District Court for the Southern District of New York (R. 140) comes before this Court on a writ of certiorari granted February 10, 1947 (R. 151). The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

In the absence of diversity of citizenship, does a federal district court, other than the bankruptcy reorganization court, have original jurisdiction over a plenary suit brought by Chapter X trustees against adverse claimants to recover on ordinary common law, or state-created, civil claims for an accounting?

Statement of the Case.

This is a civil suit for an accounting and other relief brought in the Southern District Court of New York. The respondents-plaintiffs are trustees in reorganization proceedings under Chapter X of the Bankruptcy Act pending in the United States District Court for the Eastern District of Virginia for the reorganization of Central States Electric Corporation, a Virginia corporation. The Virginia district court authorized its trustees to bring this suit (R. 4). No "property" in the control of any court is involved.

The petitioners are former directors, officers, stockholders of, or otherwise connected in the complaint with, Central States. The suit is based on allegations of breach of fiduciary duty and waste of assets by the petitioners. The causes of action alleged had accrued to Central States long before the time the reorganization proceedings were begun and are

based on state-created rights. Except for a single transaction which occurred seven years prior to the filing of this suit, all of the alleged misdeeds occurred from sixteen to twenty-eight years prior to the commencement of this action.

Respondents did not allege diversity of citizenship. The complaint rested jurisdiction on the Constitution, Article I, Section 8, Clause 4 and Article III, Section 2; on the Bankruptcy Act, 11 U. S. C.; and on Sections 24(1) and 24(19) of the Judicial Code, 28 U. S. C. §§ 41(1), 41(19) (R. 4).

The constitutional clauses relied on, empower Congress to establish uniform laws on the subject of bankruptcy and extend the federal judicial power to suits involving federal questions or brought by the United States. The sections of the Judicial Code relied on by respondents, implement these constitutional clauses. The specific sections in the Bankruptcy Act on which respondents rely, have been identified by them in the courts below as Sections 2a and 115, 11 U. S. C. §§ 11a, 515, which grant jurisdiction to bankruptcy courts in bankruptcy proceedings and, under Chapter X, afford equity receivership powers to the reorganization court.

Petitioners moved to dismiss the suit for want of jurisdiction (R. 121). The District Court, per Leibell, *D. J.*, granted the motions. (Opinion, R. 127; Order, R. 138; Judgment, R. 140.) The respondents appealed (R. 140) and the Circuit Court of Appeals for the Second Circuit (Judges Swan, A. N. Hand, and Clark) reversed the District Court's judgment and held (Opinion per Judge Clark) that jurisdiction existed under Section 2a(7) of the Bankruptcy Act (R. 142). This section grants original and exclusive federal jurisdiction in "proceedings under" the Bankruptcy Act, to "courts of bankruptcy" "to cause the estates of bankrupts to be collected."

The Issues Raised.

Jurisdiction of this suit by the District Court below depends on whether the Bankruptcy Act or the Judicial Code

express the grant of such jurisdiction. The burden is on the respondents to establish jurisdiction.

Diversity of citizenship is not alleged by respondents. The Judicial Code therefore does not afford jurisdiction unless a federal question is raised because this suit is brought by trustees appointed under Chapter X of the Bankruptcy Act, or this is a suit by officers of the United States within the meaning of Judicial Code, Section 24 (1), 28 U. S. C. § 41 (1). The district court below rejected the claims of jurisdiction under the Judicial Code and the Circuit Court of Appeals failed to pass on this point. It is self-evident that there is no merit in the attempt to predicate jurisdiction on the Judicial Code.

Concededly the Bankruptcy Act affords no jurisdiction unless the Chandler Act, 52 Stat. 842, *et seq.*, added a ground of jurisdiction. Respondents rely principally, not on a statute added by the Chandler Act to the Bankruptcy Act, but on a section in a pre-existing statute, Section 2 of the Bankruptcy Act, 11 U. S. C. § 11, which they say embodied the requisite jurisdiction but was fettered by Section 23 until that was eliminated in Chapter X matters by the Chandler Act. Sections 2 and 23 will be analyzed later to show that they were grants of entirely different kinds of jurisdiction; that Section 23 was not a limitation on Section 2; that Section 2 does not apply to a suit such as this and does not apply to a district court other than the bankruptcy court.

The further claim by respondents of jurisdiction is predicated on the addition to the Bankruptcy Act of Section 115, 11 U. S. C. § 515 which affords equity receivership powers to the reorganization court. However, the district court below is not the reorganization court.

The district court, relying principally upon two decisions of this Court, *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, and *Schumacher* v. *Beeler* (1934), 293 U. S. 367, rejected both contentions based on the Bankruptcy Act. These cases state that Section 2 was a grant of a bankruptcy jurisdiction to the bankruptcy court for bankruptcy

proceedings. Consequently, Section 2 creates no power to entertain a plenary suit at law or in equity brought in a district court other than the court sitting as the bankruptcy court. The district court below likewise related the equity receivership powers under Section 115 solely to the reorganization court. On the point that Section 2 was unfettered in Chapter X matters by the elimination of Section 23 the district court below held that federal jurisdiction is not created or enlarged by inference.

The Circuit Court of Appeals avowedly rejected the authority of this Court's decisions mentioned above. The Circuit Court decided that the interpretations of Section 2 announced by this Court had resulted from a supposed erroneous interpretation by this Court of an earlier case which had passed on the Act of 1867, *Lathrop* v. *Drake* (1875), 91 U. S. 516, or in any event that this Court's interpretations of Section 2 in the cases mentioned were *dicta* not any longer to be followed. The Circuit Court of Appeals held that the enactment of Chapter X had enlarged federal jurisdiction to include as "proceedings" in bankruptcy all plenary suits brought by trustees against adverse parties and that federal jurisdiction thereof can be exercised by any of the district courts of the United States and not solely by the one sitting as the bankruptcy or reorganization court.

The general consequence of the novel holding of the Circuit Court of Appeals is to make the jurisdiction of any federal court exclusive over state-created rights, when asserted by a Chapter X trustee, because such rights are "proceedings" under the Act and, as we show hereafter, all matters and proceedings in bankruptcy are within the exclusive jurisdiction of the federal courts. If the ruling below correctly expresses the law, the federal courts have not had such a large grant of jurisdiction nor has there been such redistribution of power as between state and federal courts since the repeal of the Bankrupt Act of 1867.

We base the argument which follows on the oft-repeated proposition that "bankruptcy courts must administer and

enforce the Bankruptcy Act as interpreted by this Court * * *." *Vanston* v. *Greene (Inland Gas Corporation)*, U. S. , decided December 9, 1946. We rely principally on the interpretation of the Act by this Court in *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, and *Schumacher* v. *Beeler* (1934), 293 U. S. 367, both of which the Circuit Court of Appeals openly disregarded.

Specification of Errors.

We shall urge that no provision of the Bankruptcy Act or of the Judicial Code confers jurisdiction on the District Court. The District Court below is not the bankruptcy (reorganization) court.

The Circuit Court of Appeals erred:

1. In reversing the District Court and sustaining its jurisdiction over this action.

2. In holding that jurisdiction over this action existed under Section 2a(7) of the Bankruptcy Act.

POINT I.

THE BANKRUPTCY ACT DOES NOT CONFER THE REQUISITE FEDERAL JURISDICTION.

The nature of this suit is not in dispute. This is a plenary suit *in personam*. No bankruptcy controversy is involved. No reorganization problem is presented. No "property" of the debtor or under the control or possession of the court is in litigation. *Cf. Mueller* v. *Nugent* (1901), 184 U. S. 1, 14-15. The jurisdiction is not *in rem*. The action is one to account for alleged breach of fiduciary duty and waste of corporate assets, and is one that may be tried only in a plenary suit. *Park* v. *Cameron* (1915), 237 U. S. 616; *Babbitt* v. *Dutcher* (1910), 216 U. S. 102, 113-14.

Jurisdiction of a plenary suit based on state-created rights is not to be found in Chapter X. Nor does Chapter X deal

with any district court other than that in which the reorganization is pending or to which it has been transferred. The shortest answer to the question presented is the very language of the statute.

Chapter X by its terms grants jurisdiction only to that district court where, by reason of the filing of the petition, Section 114, 11 U. S. C. § 514, or the transference to it of the proceeding, Section 118, 11 U. S. C. § 518, it has become the reorganization court.

Chapter X relates solely to proceedings under the reorganization sections and excludes from its scope a controversy involving state-created rights, such as this case. Section 101, 11 U. S. C. § 501, states:

> "The provisions of this chapter shall apply *exclusively* to proceedings *under* this chapter." (Italics supplied.)

The district court below is not the reorganization court nor is this a proceeding under Chapter X or based on federally-created rights.

Accordingly, any search for other sections of the Bankruptcy Act to discover the jurisdiction for which respondents contend must necessarily be futile. Irrespective of this point, jurisdiction can not be spelled out of the Bankruptcy Act.

Chapter X incorporates by reference certain general provisions of the Bankruptcy Act by providing in Section 102, 11 U. S. C. § 502, that:

> "The provisions of Chapters 1 to 7, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this Chapter, apply in proceedings under this chapter: *Provided, however,* That Section 23 * * * shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of Chapters 1 to 7, inclusive. * * * "

Thus the sections borrowed from the general Bankruptcy Act are imported to "apply in proceedings under" Chapter X.

No provision is imported into Chapter X which refers to the jurisdiction of an ordinary district court in a suit involving state-created rights or to a controversy other than a proceeding under the Act, and as noted above, no such provision exists in Chapter X. Section 23, 11 U. S. C. § 46, contains the only grant of such jurisdiction, but that is eliminated by command of Section 102.

Section 2 of the Bankruptcy Act, 11 U. S. C. § 11, is the only section dealing with jurisdiction on which respondents rely which is incorporated by reference in Chapter X. But Section 2 deals with jurisdiction of *courts of bankruptcy* in relation to *bankruptcy proceedings*. Bankruptcy proceedings are of a summary nature only.

The Circuit Court of Appeals held that jurisdiction of this action in the Southern District of New York existed under Section 2a(7) of the Bankruptcy Act. It is clear, however, that Section 2a(7) is applicable only to the reorganization court in Virginia. Section 2a(7) applies only to summary proceedings and not to plenary suits such as this, and such summary proceedings may be brought only in the reorganization court, which has exclusive jurisdiction thereof.

A. Section 2a(7) of the Act of 1898 deals only with summary proceedings.

Section 2a(7) of the Bankruptcy Act of 1898, as amended, 52 Stat. 842, 11 U. S. C. § 11a(7), reads:

> "CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act,* in vacation, in chambers, and during

* The only change effected in this section by the Chandler Act was to change the words "bankruptcy proceedings" to "proceedings under this Act." This was done "in order to embrace the new debtor relief sections." Hanna & McLaughlin, The Bankruptcy Act of 1898, as amended, including the Chandler Act of 1938 (1939) 5.

their respective terms, as they are now or may be hereafter held, to— * * *

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; * * *."

In bankruptcy legislation and litigation, "bankruptcy proceedings" or "proceedings under this Act" have had but one denotation: that of summary proceedings. Section 6 of the Act of 1841, 5 Stat. 443, 445, specifically provided that jurisdiction in "bankruptcy proceedings" should "be exercised summarily in the nature of summary proceedings in equity." Section 1 of the Bankrupt Act of 1867, 14 Stat. 517, was based on this concept—"bankruptcy proceedings" under that Act were summary in nature. *Smith* v. *Mason* (1871), 14 Wall. 419; *Marshall* v. *Knox* (1872), 16 Wall. 551. Suits at law or in equity were no part of the bankruptcy proceeding. *Wiswall* v. *Campbell* (1876), 93 U. S. 347. And the same principle was continued when Section 1 of the Act of 1867 was carried over into Section 2 of the Act of 1898. *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, 533; *Schumacher* v. *Beeler* (1934), 293 U. S. 367.

The fact that by Section 2a the court of bankruptcy may exercise its jurisdiction "in vacation, in chambers, * * *" is indicative of a summary, not plenary, jurisdiction. *Smith* v. *Mason* (1871), 14 Wall. 419. Section 2 embodies the grant of jurisdiction over proceedings in bankruptcy. Twenty-one subdivisions enumerate the proceedings covered by Section 2. Each of the 21 subdivisions affords exclusively summary jurisdiction to the bankruptcy court. The Bankruptcy Act did not intrude a plenary jurisdiction into Subdivision "(7)" of Section 2a.

Thus, under Section 2a(7), the bankruptcy court may in

summary fashion deal with a trustee's petition for permission to sue adverse claimants in a foreign district, and by summary determination (as in this case) direct the trustee to sue and thereby "cause" the claim to be collected and reduced to money. Again, when the claim has been reduced to the possession of the bankruptcy court by the trustee, that court may in summary fashion determine any controversies in the bankruptcy proceedings themselves.

The separation between the summary jurisdiction and the plenary jurisdiction of the bankruptcy court is carefully spelled out in the Act itself. In Section 23(a) Congress carefully pointed up the distinction between "bankruptcy proceedings" or "proceedings under this Act" which are summary in nature and other "controversies at law or in equity" which are plenary in nature. These very phrases: "bankruptcy proceedings" and "proceedings under this Act," contradict the respondents' thesis that this case is governed by Section 2. Certainly this suit is not a "bankruptcy proceeding"; but even more evident is the fact that this action is not a "proceeding *under* this Act" for none of the substantive issues involve this statute, nor are any of the alleged rights or causes of action created by this statute.

Congress has recently illustrated this plan of the Bankruptcy Act and its conception of Section 2 as one dealing solely with summary proceedings. In enacting Chapter X (Chandler Act, 1938), by the simple expedient of adding subdivision 21 to Section 2a of the Bankruptcy Act, Congress was able to convert certain suits, formerly plenary, into summary proceedings. *Emil* v. *Hanley* (1943), 318 U. S. 515, 519.

The respondents have heretofore urged that Section 2 of the Act of 1898 should be construed by analogy to the construction placed upon Section 1 of the Act of 1867. Respondents have said that under Section 1 of the Act of 1867 all of the district courts of the United States were held to have jurisdiction, without regard to diversity of citizenship of the parties, of suits to which a trustee in bankruptcy was a party. Respondents have cited *Lathrop* v. *Drake* (1875),

91 U. S. 516, in support. However, this Court has said that the jurisdiction in the *Lathrop* case "was upheld, not under the provisions of section 1 of that act, * * * but wholly under the distinct clause of section 2." *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, at 531:

> "In *Lathrop* v. *Drake* (1875), 91 U. S. 516, the jurisdiction conferred on the District Courts and the Circuit Courts of the United States by the Bankrupt Act of 1867 was defined by this court, * * *. And the jurisdiction of the District and Circuit Courts over suits * * * in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of section 1 of that act, * * * but wholly under the distinct clause of section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.'"

Mr. Justice Gray writing for this Court in the *Bardes* case then summarized the difference between the jurisdiction in bankruptcy proceedings under Section 1 of the Act of 1867 and the jurisdiction over plenary suits *in personam* under Section 2 of the same Act.

> "Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the District Courts and Circuit Courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the Circuit and District Courts of the United States, did not divest or impair the jurisdiction of the state courts over like cases." (p. 533).

The proper interpretation as announced by the *Bardes* decision was followed by this Court thirty-four years later in *Schumacher* v. *Beeler* (1934), 293 U. S. 367, 372.

Respondents have attempted to show that Section 1 of the Act of 1867 embodied a grant of general jurisdiction over plenary suits by trustees on state-created rights and that a grant of similar scope is reflected in Section 2a(7) of the Act of 1898. As the cases show, however, the general grant of jurisdiction in the Act of 1867 was not in Section 1, but rather in Section 2, and was to both the circuit and district courts. Thus the respondents really seek for Section 2a(7) of the Act of 1898 the effect of Section 2 of the Act of 1867. Nothing need be added to the rejection of that argument by this Court in the *Bardes* case (p. 537):

> "The bankrupt acts of 1867 and 1841, as has been seen, each contain a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provision of § 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts."

The very argument on Section 2a(7) of the Act of 1898 on which respondents rely to sustain jurisdiction was rejected in the *Bardes* case:

> "The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the act of 1867 • • •" (p. 535).

The Circuit Court of Appeals nevertheless ruled that the construction of Section 2 of the Act of 1898 by the Supreme Court in the *Bardes* and *Schumacher* cases—the construction

for which we contend—was error. We respectfully submit that the error was not made evident by the opinion of the Circuit Court. It should be noted that apparently no such error was found by Congress to exist. After making its exhaustive study of the Bankruptcy Act of 1898, in preparation for its general revision of that Act in 1938, it made no change in the language of Section 2 to "correct" the interpretation of that section by this Court. It is settled doctrine that congressional reenactment of statutes following interpretative decisions made by this Court, is deemed an acceptance by Congress of such interpretations for purposes of the legislation. *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469, 488-489.

The Circuit Court of Appeals, in disregard of the Supreme Court's interpretation, held that "proceedings under this Act" or "bankruptcy proceedings" were not restricted to summary proceedings because in other parts of the Act, the word "proceedings" was used with other connotations. The Circuit Court did not, however, emphasize the fact that in three of these four other sections the word "proceedings" is expressly preceded by the adjective "plenary," Sections 60b, 67e, 70e(3), 11 U. S. C. §§ 96b, 107e, 110e(3), and in the fourth, Section 11e, 11 U. S. C. § 29e, the proceeding referred to is not a "bankruptcy" proceeding nor a proceeding "under this Act." This construction is fortified by express provision of the Judicial Code, Section 256, amended, "Sixth," 28 U. S. C. § 371, amended "Sixth." Matters and proceedings "in bankruptcy" are exclusively federal. In contrast, proceedings not "in bankruptcy," Sections 11e, 60b, 67e, and 70e(3), are not exclusively federal.

A further consequence of the Circuit Court's ruling that ordinary suits by Chapter X trustees are proceedings under the Act would be the withdrawal of the historical right of jury trial. The right to a jury trial in bankruptcy proceedings is restricted largely to the issue of insolvency and the commission of acts of bankruptcy. Section 19, 11 U. S. C. § 42; *Elliott* v. *Toeppner* (1902), 187 U. S. 327. Of course, in plenary actions which cannot be brought under Section 2, and in which a trustee happens to be a plaintiff or defendant,

jury trials are available. *Barton* v. *Barbour* (1881), 104 U. S. 126; *Wm. Edwards & Co.* v. *LaDow* (C. C. A. 6th, 1916), 230 F. 378, 381; *In re Russell* (C. C. A. 2d, 1900), 101 F. 248, 251. *Cf. Smith* v. *Mason* (1871), 14 Wall. 419. But, proceedings under the Act are of equitable cognizance, *Pepper* v. *Litton* (1939), 308 U. S. 295, and jury trial is a matter of discretion, *Burnham* v. *Todd* (C. C. A. 5th, 1944), 139 F. (2d) 338; *Shor* v. *McGregor* (C. C. A. 5th, 1939), 108 F. (2d) 421; *In re Rude* (D. Ky., 1900), 101 F. 805; *In re Christenson* (N. D. Iowa, 1900), 101 F. 243. For example, on the construction sought by the respondents, a defendant, a debtor of a bankrupt, in an ordinary suit on a promissory note would lose his absolute right to a jury trial merely by reason of the bankruptcy of his adversary. And as hereafter shown even the same courts would no longer remain open for such contests; sustaining the contention of the trustees would result in federal jurisdiction exclusively over ordinary state-created rights.

B. Jurisdiction under Section 2a(7) is vested exclusively in the reorganization court.

There can be little argument about the fact that the jurisdiction established by Section 2a(7) of the Act may be exercised only in the bankruptcy court.

> "Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation thereto [§ 2a(7)]; the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entering of such judgments 'as may be necessary for the enforcement of the provisions' of the act. In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. United States Fidelity & G. Co. v. Bray, 225 U. S. 205, 217."
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> *Pepper* v. *Litton* (1939), 308 U. S. 295, 304.

In *United States Fidelity & G. Co.* v. *Bray* (1912), 225

U. S. 205, 217, this Court stated, in an opinion by Mr. Justice Van Devanter:

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

Respondents contend, however, that this jurisdiction, limited to the bankruptcy courts, does not restrict the jurisdiction to the court in which the bankruptcy or reorganization proceedings are pending, but includes every federal district court. Their argument would seem to be based on Section 1(10) of the Act, 11 U. S. C. § 1(10), which creates courts of bankruptcy:

> "'Courts of bankruptcy' shall include the district courts of the United States and of the Territories and possessions to which this Act is or may hereafter be applicable, and the District Court of the United States for the District of Columbia; * * *."

Their argument, however, fails to take into consideration the distinction between a court which is authorized to act as a court of bankruptcy and a court which in fact is acting as a court of bankruptcy. Every federal district court is authorized to act as a bankruptcy or reorganization court; only a district court in which bankruptcy proceedings have been filed is acting as a court of bankruptcy with relation to those proceedings. Sections 1(10), 2, 11 U. S. C. §§ 1(10), 11. This distinction is most clearly spelled out in *Norris' Case* (E. D. Mich., 1870), Fed. Cas. No. 10304, 18 Fed. Cas. 317,

317-18; see also *Operator's Piano Co.* v. *First Wisconsin T. Co.* (C. C. A. 7th, 1922), 283 Fed. 904.

In the *Norris* case, the Court said (pp. 317-18):

> "By section 1 of the bankrupt act the district courts are constituted 'courts of bankruptcy,' with certain general and specific powers and jurisdiction. Courts of bankruptcy, as they existed in England at the time the act was passed, were and still are separate and distinct organizations, with powers and jurisdiction separate and distinct from all other courts, and it is undoubtedly in this sense that the words are used in the act; that is, courts possessing power and jurisdiction peculiar to themselves. The only difference is that here, instead of creating a new organization, an organization already existing, known as the district court, is taken up and made use of in lieu of such new organization. But the district court, when acting as a court of bankruptcy, is none the less a separate and distinct court, and exercising powers and jurisdiction separate and distinct from its powers and jurisdiction as district court, than if it were such separate and distinct organization."

A district court other than the bankruptcy court depends for jurisdiction not on the provisions of the Bankruptcy Act, which do not relate to it, but on the provisions of the Judicial Code governing all civil litigation. Judicial Code, Section 24, 28 U. S. C. § 41. The district court's jurisdiction sitting as an ordinary court is the same as if bankruptcy had not intervened.

The District Court for the Southern District of New York in this case was not requested to exercise its bankruptcy powers but was requested to act only within its general non-bankruptcy jurisdiction. Section 2a(7), therefore, did not confer jurisdiction over this action. The order of the Virginia district court authorizing this suit could not invest the district court in New York with jurisdiction (R. 4).

> "Of the fact that the suit was begun in the Circuit Court with the express leave of the court of bank-

> ruptcy it suffices to say that the latter is not at liberty to surrender its exclusive control over matters of administration or to confide them to another tribunal."
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> *United States Fidelity & G. Co. v. Bray* (1912), 225 U. S. 205, 218.

C. The inapplicability of Section 23 to Chapter X proceedings does not expand the scope of jurisdiction of Section 2.

The only section of the general Bankruptcy Act which does deal with jurisdiction of plenary suits *in personam* such as this one, as distinguished from bankruptcy proceedings, in district courts other than the court of bankruptcy is Section 23, 11 U. S. C. § 46.

Section 102, 11 U. S. C. § 502, of Chapter X makes Section 23 inapplicable to a reorganization proceeding unless an order is entered directing that bankruptcy liquidation be proceeded with.

The respondents contend that Section 2a(7) was a general grant of jurisdiction to the federal courts which was narrowed by Section 23. Therefore, they say that the removal of Section 23 from Chapter X matters unshackled the general grant in Section 2a(7) so as to afford all district courts unlimited jurisdiction of suits by trustees. In support of the contention that Section 2a(7) was a general grant of jurisdiction respondents say that this section was derived from Section 1 of the Act of 1867 which had been construed as such a general grant. Recognizing that this Court has interpreted Section 2a(7) as a grant, not of general jurisdiction, but as a grant of summary bankruptcy jurisdiction not applicable to plenary suits, the respondents have urged that this Court has misapprehended the scope of Section 2a(7) or else reached such interpretations under the limiting effect of the presence in the Act of Section 23.

The contentions of the respondents are invalid. This Court has squarely interpreted Section 23 as an independent grant of jurisdiction. Section 23 appeared in bankruptcy legislation for the first time in the Act of 1898. Its purpose

was to substitute for the general grant of jurisdiction found in Section 2 of the Act of 1867, a sharply restricted grant of plenary jurisdiction. Section 2 of the Act of 1867 finds no counterpart in the Act of 1898 except in the limited substitute of Section 23.

Section 2 of the Act of 1898 was restricted to a grant of bankruptcy jurisdiction to the bankruptcy court over summary bankruptcy proceedings formerly provided for in Section 1 of the Act of 1867.

Two years after enactment of the Act of 1898, this Court so interpreted Sections 2 and 23 of the Act of 1898. *Bardes* v. *Hawarden First National Bank* (1900), 178 U. S. 524, 535:

> "The section [2] nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of incidental powers * * *."

Speaking of the general grant of jurisdiction to the federal courts under the Act of 1867 to entertain plenary suits by trustees, this Court in the *Bardes* case, *supra*, said at page 537:

> "We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and *substituted* the restricted provision of § 23, it intended that either of those courts should retain the jurisdiction which it had under the *obsolete* provision of the earlier acts." (Emphasis supplied.)

It was clearly understood by this Court that Section 23 was a grant of jurisdiction and not a limitation on the jurisdiction created by Section 2:

> "We think that the exceptions thus established by the amending acts show clearly that it was the intent of Congress that § 23b should operate as a grant of jurisdiction of suits brought by a trustee in bankruptcy against adverse claimants * * *."
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> Mr. Chief Justice Hughes, in *Schumacher* v. *Beeler* (1934), 293 U. S. 367, 377; see also *id.* at 374.

See also,

Bardes v. *Hawarden First National Bank* (1900), 178 U. S. 524.

The provisions of Sections 23 and 2a(7) and analysis of the legislative history of the Act of 1898 and of the purposes of the sections added in 1938 by Chapter X prove that the district court below has no jurisdiction of this suit under the bankruptcy laws.

Section 23 now provides that all district courts have the same jurisdiction of all controversies at law or in equity, as distinguished from proceedings under the Bankruptcy Act, between receivers or trustees and adverse claimants concerning the property acquired or claimed by the receivers or trustees, as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimant. Section 23 further provides that such suits shall be brought only where the bankrupt could have sued in the absence of bankruptcy, unless the defendant otherwise consents and except as otherwise provided in specified statutory proceedings created by the Bankruptcy Act.

The Act of 1898, as originally enacted, made mutually exclusive provision, for the summary jurisdiction in bankruptcy proceedings and incidental controversies therein, on the one hand, and for jurisdiction of plenary suits involving controversies at law and in equity between the trustee and adverse parties, strangers to the proceedings, on the other hand.

Section 23 as originally enacted in 1898 provided:

> "JURISDICTION OF UNITED STATES AND STATE COURTS. (a) The United States *circuit* courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent *only as though bankruptcy proceedings had not been instituted* and such controversies had been between the bankrupts and such adverse claimants." (Italics supplied.)

Section 23(a) thus required the preexistence of federal jurisdiction under the Judicial Code. Section 23(a) merely preserved jurisdiction afforded under the Judiciary Act of 1789 as between party and party, and specified that the bankrupt was to be deemed the litigant.

Section 23 further provided:

> "(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Section 23(b) did not affect the distribution of power between state and federal courts. It preserved to debtors of the bankrupt their rights to state courts but it permitted such debtors to consent to federal jurisdiction.

Ordinarily jurisdiction cannot be conferred by consent even by Act of Congress. However,

> "The Congress by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. * * * Exercising that power, the Congress prescribed in Section 23b the condition of consent on the part of the defendant sued by the trustee. Section 23b was thus in effect a grant of jurisdiction subject to that condition."
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> *Schumacher* v. *Beeler* (1934), 293 U. S. 367, 374.

Thus, Section 23(b) operates as a grant of a consent jurisdiction, which a federal court could not otherwise exercise.

Later, when the courts of bankruptcy were given a jurisdiction concurrent with that of the state courts to entertain

plenary suits under Sections 60, 67 and 70 of the Bankruptcy Act relating to fraudulent transfers and preferences, Section 23(b) was also amended by eliminating the requirement for consent in such suits. *Taubel Co.* v. *Fox* (1924), 264 U. S. 426, 433-4. The grant of jurisdiction over the plenary suits so excepted together with the grant of federal jurisdiction in cases of the debtor's consent mark the limit of federal jurisdiction over plenary suits against adverse parties under the Bankruptcy Act. The implication from these express grants of federal plenary jurisdiction fortifies the conclusion drawn from its own terms that a grant of similar jurisdiction does not exist in Section 2 of the Bankruptcy Act.

As heretofore noted, the history of the Bankruptcy Act shows that in the Acts of 1841 and 1867 Congress provided in separate sections for the bankruptcy court's summary jurisdiction and plenary jurisdiction. The plenary jurisdiction was exercisable concurrently by the district and circuit courts. Act of 1841, Section 8, 5 Stat. 443, 446; Act of 1867, Section 2, 14 Stat. 517, 518; *Morgan* v. *Thornhill* (1870), 11 Wall. 65; *Wiswall* v. *Campbell* (1876), 93 U. S. 347; *Schumacher* v. *Beeler* (1934), 293 U. S. 367. The distinction between and separate treatment of the summary and plenary jurisdictions was not lost sight of in the Act of 1898 in enacting Sections 2 and 23 of that Act. *Bardes* v. *Hawarden First Nat. Bank* (1900), 178 U. S. 524; *Schumacher* v. *Beeler*, *supra*.

The plenary jurisdiction referred to in Section 23 of the Act of 1898 was different from that granted in the previous acts in failing to afford concurrent jurisdiction and restricting that plenary jurisdiction to the circuit court alone, and granting jurisdiction to any court, including the bankruptcy court, where the defendant consented to be sued. *Bardes* v. *Hawarden First National Bank*, *supra*; 30 Cong. Rec. 601, 55th Cong., 1st Sess. (1897). Until the circuit court was abolished in 1911 plenary suits based on state-created rights could not be brought in an ordinary district court save on consent. Only the circuit court had jurisdiction in such suits between trustees and adverse claimants without the

defendant's consent and this jurisdiction rested on and was subject to the requirements of the Judicial Code, as if bankruptcy had not intervened. During the same period the district courts, on the other hand, had original and exclusive jurisdiction of bankruptcy proceedings, exercisable summarily as well as jurisdiction on consent. The district courts as such, and not as courts of bankruptcy, have since 1911 inherited the jurisdiction formerly exercised by the circuit court. The traditional jurisdiction of district courts as courts of bankruptcy, however, is in *rem*, a summary jurisdiction. *Taubel Co.* v. *Fox* (1924), 264 U. S. 426.

Thus the plan of the Act of 1898 was clear. Of the two federal courts, where there was no consent to suit, only the circuit court had jurisdiction of controversies at law and in equity based on state-created rights, as distinguished from proceedings in bankruptcy or rights created by the Act, between trustees and adverse parties. And it had that jurisdiction only in those cases in which federal jurisdiction otherwise existed. That jurisdiction was necessarily one enjoyed not exclusively but concurrently with the state courts. Judiciary Act of 1789; Bankruptcy Act, Section 23(a). On the other hand, the district courts as courts of bankruptcy had original and exclusive jurisdiction of bankruptcy proceedings, exercisable in summary fashion, Section 2, except the additional jurisdiction on consent.

The legislative history of the Act of 1898 shows that Section 2 was never thought of as being concerned with ordinary civil litigations. 30 Cong. Rec. 601, *et seq.*, 55th Cong., 1st Sess. (1897). The desire to restrict federal jurisdiction was clearly manifest. 31 *id.* 1785, 6433, 55th Cong., 2d Sess. (1898).

In the discussion of the bill which emerged as the Act of 1898, the Chairman of the Judiciary Committee stated as follows, 31 Cong. Rec. 1785:

> "The jurisdiction of state courts to try controversies between the trustees of bankrupt estates and parties claiming adverse interest is not in any way interfered

with * * *: Under the last bankruptcy law the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was a great inconvenience and much expense * * *. Such will not be the effect under this bill." *

It is thus clear from the plain language of the statute, the historical and legislative background and the decided cases, that Sections 2 and 23 of the Act of 1898 refer to basically different jurisdictions and that Section 2 does not embrace this type of suit.

The respondents nevertheless contend that Section 23 was not a grant of jurisdiction but merely a limitation on Section 2, because of the "except" clause in Section 2a(7) which has been held to refer to Section 23. The bankruptcy court is granted original jurisdiction in proceedings under this title by Section 2a to—

> "(7) Cause the estate of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided," * * *."

The respondent would read the "except" clause as a limitation on the jurisdiction of the district court granted under Section 2. The Circuit Court of Appeals likewise took this view on the ground that "Obviously a section which deals with jurisdiction over civil actions can be an exception to another section only if that other section also deals with jurisdiction over civil suits" (R. 147). But this statement ignores the language and plan of the Act. The language in the Act connotes, not a limitation on the sole jurisdiction conferred by Section 2a(7) but an additional grant of jurisdiction under circumstances not present in this case. The word "except" is used as a conjunction which uniformly is defined as the equivalent of the word "unless." Certainly one section dealing with the jurisdiction of the Bankruptcy

* *Cf.*, Frankfurter and Landis, The Business of the Supreme Court (1928) 63 n. 24.

Court can supplement another section which also deals with the jurisdiction of the Bankruptcy Court.

Section 2 expresses the sole jurisdiction of the bankruptcy court except as supplemented by Section 23, *i.e.*, using the language of Section 2a(7), "except [unless] as herein otherwise [further] provided [added]." The only supplemental jurisdiction was the jurisdiction in Section 23(b).*

The Circuit Court of Appeals asserted (R. 148) that "in eliminating § 23 from corporate reorganizations under Chapter X, Congress intended to enlarge" the jurisdiction of ordinary district courts to accommodate suits by trustees, irrespective of diversity or requisite amount. Two law writers are named as supporting the Court's views.** We respectfully suggest that the elimination of a statute dealing with jurisdiction was not a grant of another jurisdiction or enlargement of jurisdiction otherwise inadequate for such suits.

The court below found no basis for federal jurisdiction of this suit within the jurisdictional provisions peculiarly applicable to Chapter X. Sections 114, 118, 11 U. S. C. §§ 514, 518. It had to rest its finding of federal jurisdiction solely on Section 2 as imported into Chapter X by Section 102. The court below reasoned that because greater power of scrutiny was granted to a Chapter X trustee, Sections 165, 167, 11 U. S. C. §§ 565, 567, and because he has the duty to formulate a plan of reorganization, Section 169, 11 U. S. C. § 569, the elimination of Section 23 was intended to enlarge the scope of federal jurisdiction under Section 2 to include plenary jurisdiction to "be exercised by all the district

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* Later additions are found in Sections 60, 67 and 70. Section 23(b) was amended at the same time eliminating requirement of consent to the added jurisdiction.

** 1. One of the supporting texts referred to is as yet unpublished, viz., Professor Moore, 6 Collier on Bankruptcy, 14th Ed. § 3.20 [R. 149].

2. The other writer, Mr. Gerdes, seems to have been concerned with the different problem of clarifying the equity receivership powers of the reorganization court. His view seems to have been that Section 23(b) impeded the receivership powers of the trustee. 2 Gerdes on Corporate Reorganization, p. 1478. The C. C. A. 3 Cir. held otherwise as to comparable provisions in former Sec. 77-B of the Bankruptcy Act in *In re Standard Gas & Electric Corp.*, 119 F. 2d 658; as did also the C. C. A. 7 Cir. in *In re Prima Co.*, 98 F. 2d 952, cert. den. 305 U. S. 658. *Cf. Warder v. Brady* (C. C. A. 4 Cir.), 115 F. 2d 89.

courts, and not solely by the one in which the bankruptcy or reorganization petition was originally filed" (R. 147).

There is nothing in the legislative history of the 1938 additions to the Act of 1898 (Chapter X) to show any intention of Congress to enlarge the scope of federal jurisdiction. The nation-wide property jurisdiction of the domiciliary court over property of the debtor was a modification of venue requirements and not a grant of a new federal jurisdiction, Section 111. 11 U. S. C. § 511.

The concern of Congress in enacting the Act of 1898 had been to limit and restrict the scope of federal jurisdiction. No evidence appears in the legislative history that deviation from that attitude was intended in 1938 or that the distribution of power over state-created rights as between state and federal courts generally, was being realigned. As the District Judge aptly observed (R. 135), more would seem to be required than Section 102 to accomplish so great a change in a jurisdictional provision. Such far reaching jurisdiction "should be sought in the language of the statute, and should not be based on a far-fetched inference" (R. 135).*

Section 23 was obviously irrelevant to the purposes of Chapter X. The concern of Chapter X is with "proceedings" to reorganize the debtor. On the other hand, Section 23 is not concerned with administration of property nor proceedings to reorganize the debtor; it, as part of the Bankruptcy Act proper, is concerned with liquidation. It was because of these differences in purpose and not to enlarge the jurisdiction of the federal court that Section 23 was specifically designated as one of the sections of the Bankruptcy Act not incorporated in Chapter X.

The plan of Chapter X was to give the trustee powers necessary to effect reorganization in the domiciliary court by "proceedings," Section 114, and to give him power to deal in that court with matters *in personam* in his capacity

* No mention of the supposed expansion of jurisdiction is made in a comprehensive article dealing with the important procedural changes effected by the Chandler Act. *Douglas, Improvement in Federal Procedure for Corporate Reorganization* (1938) 24 A. B. A. J. 875.

as an equity receiver, Section 115. If reorganization efforts fail and liquidation is ordered, the trustee is given an additional aid for liquidation by the grant of jurisdiction under Section 23.

A Chapter X trustee has no need for greater access to federal courts to collect debts than that accorded to a bankruptcy trustee. The prime function of a bankruptcy trustee is to liquidate, collect and distribute. The reorganization trustee's purpose is not primarily liquidation but to maintain the *status quo* and to realign interests. Federal jurisdiction over suits on state-created rights would confer no advantage on the trustee. *Cf. Erie* v. *Tompkins* (1938), 304 U. S. 64.

D. The construction of the Act adopted by the Circuit Court of Appeals would divest the state courts of jurisdiction.

We do not contest the power of Congress to create the jurisdiction sought by the respondents. *Taubel Co.* v. *Fox* (1924), 264 U. S. 426. We have attempted to show that Congress has not exercised any such power. One more point in support of our thesis is that since jurisdiction under 2a(7) is exclusive in the bankruptcy courts and exclusively federal, Judicial Code, Section 256, amended "Sixth," 28 U. S. C. § 371, amended "Sixth"; *Pepper* v. *Litton* (1939), 308 U. S. 295, 304; *United States Fidelity & G. Co.* v. *Bray* (1912), 225 U. S. 205, 217, the state courts are excluded from entertaining a similar jurisdiction. Nevertheless, the claims in this case are traditionally and unquestionably cognizable by the state courts. See *Brown* v. *Gerdes* (1944), 321 U. S. 178, 185-6; *Hastings* v. *Bylesby & Co.* (1941), 286 N. Y. 468; *Kidder* v. *Horrobin* (1878), 72 N. Y. 159.

In reliance on the interpretations of this Court, innumerable suits must have been maintained in the state courts, the judgments in which will be voided if this Court does not follow its earlier rulings in the *Bardes* and *Schumacher* cases. The issues presented by such plenary suits turn basically on state-created rights. Congress intended to make no

such inroads; as those suggested by the respondents, on the jurisdiction of the state courts. See 31 Cong. Rec. 1785, *supra*, pp. 22-3.

E. Jurisdiction does not exist under Section 115 of the Act.

The respondents have suggested that jurisdiction exists under Section 115 of the Bankruptcy Act, 11 U. S. C. § 515. This point was advisedly not strongly urged below and was not considered in the opinion of the Circuit Court of Appeals.

The jurisdiction, powers and duties of a reorganization court are defined in Section 114 of the Bankruptcy Act, 11 U. S. C. § 514, to be the same as in a bankruptcy proceeding on adjudication, where not inconsistent with the provisions of Chapter X. Section 114 reads:

> "Section 114. Upon the approval of a petition, the jurisdiction, powers and duties of *the court* and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a *bankruptcy proceeding* upon adjudication." (Italics supplied.)

Since this is not a proceeding under Chapter X and the jurisdiction of this court is not to be found in Chapter X it necessarily follows that the power of the respondents as trustees to sue in this court is not to be found in Chapter X. The power conferred on an officer can be no greater than the power of his appointing court.

Section 115 of the Bankruptcy Act, 11 U. S. C. § 515, gives the domiciliary court "powers" additional to those granted by Section 114, as follows:

> "Section 115. Upon the approval of a petition, *the court* shall have and may, in addition to the jurisdiction, powers and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature." (Italics supplied.)

There can be no doubt that this additional grant of power is in favor of the domiciliary court. In the preceding section relating to jurisdiction as well as in Section 115 the court referred to is the court in which the petition is filed or to be approved. The definitions in the Act dispel all doubt on this point.

> "'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending." Section 1(9), 11 U. S. C. § 1(9).

This definition is incorporated in Chapter X, Section 102, 11 U. S. C. § 502.

The grant of equity receivership powers to the reorganization court may have been deemed by some in Congress to be inconsistent with Section 23(b). Some law writers* and courts thought the inconsistency existed because of the power of an equity receiver as distinguished from a trustee in bankruptcy to litigate plenary claims in his home court, irrespective of diversity. This power followed from the equity court's property jurisdiction and control. This presumed inconsistency with Section 115 may have been a reason for eliminating Section 23 from Chapter X. But surely Section 23 was not thought by the Congress to be inconsistent with Section 2; both sections had been in the same statute for 40 years.

While, indeed, Chapter X accords equity receivership powers to the domiciliary court, the Court's trustee-receiver was not thereby granted access by reason of his office to other district courts generally, nor were the limits of jurisdiction of such other courts thereby broadened.

An equity receiver was never afforded access to federal courts other than the domiciliary court, merely by reason of his office, for the purpose of bringing plenary suits *in personam*.

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* See footnote **2, p. 24, *supra*.

Gableman v. *Peoria D. & E.* (1900), 179 U. S. 335;
Barfield v. *Zenith T. & R.* (N. D. Ohio, 1924), 9 F. (2d) 204;
Kelley v. *Queeney* (W. D. N. Y. 1941), 41 F. Supp. 1015.

The respondents contend that, in effect, they are acting as receivers in an ancillary suit in New York, and, though no property in the possession of the debtor or in the control of the court is involved in this suit, that jurisdiction exists regardless of the citizenship of the parties or the absence of any other ground for federal jurisdiction. This Court pointed out in *Mitchell* v. *Maurer* (1934), 293 U. S. 237, 243, that it had never squarely decided the issue, though "In Raphael v. Trask, 194 U. S. 272, it is intimated that the jurisdiction of the federal court cannot be based upon an original suit in another federal court."

The federal courts, however, have spelled out the proper criteria to be followed. Ancillary jurisdiction exists in the district court in which the receivership proceedings are pending. *White* v. *Ewing* (1895), 159 U. S. 36. And in our analysis, ancillary jurisdiction exists in another federal court, only if property of the debtor is located within and is the basis of the ancillary court's jurisdiction. Receivership is a function related to control of property. But, absent a property jurisdiction, there can be no ancillary jurisdiction in one federal court based on the jurisdiction of another federal court. See *Raphael* v. *Trask* (1904), 194 U. S. 272, *Kelley* v. *Queeney* (W. D. N. Y., 1941), 41 F. Supp. 1015, and *Winter* v. *Swinburne* (C. C. E. D. Wisc., 1881), 8 F. 49, for a discussion of this rule. See also *Lesnik* v. *Public Industrial Corp.* (C. C. A. 2, 1944), 144 F. (2d) 968, 976, n. 11.

POINT II.

JURISDICTION DOES NOT EXIST UNDER SECTION 24(1) OF THE JUDICIAL CODE.

The respondents' complaint alleges that jurisdiction exists under Section 24(1) of the Judicial Code, 28 U. S. C.

§ 41(1). There is no allegation of diversity of citizenship of the parties. Accordingly, to establish jurisdiction under the Judicial Code, respondents must show that a federal question is involved or that the suit has been brought by the United States or its officers.

A. There is no federal question involved in this case.

"* * * the mere fact that plaintiff was a trustee in bankruptcy did not give jurisdiction." *Spencer* v. *Duplan Silk Co.* (1903), 191 U. S. 526, 531; *Gableman* v. *Peoria B. & E.* (1900), 179 U. S. 335; *Pope* v. *Louisville, N. A. & C. Co.* (1889), 173 U. S. 573.

Mr. Justice Cardozo, on behalf of this Court, stated succinctly and poignantly the tests of the presence of a federal question. *Gully* v. *First National Bank* (1936), 299 U. S. 109, 112-13:

> "How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. *Starin* v. *New York*, 115 U. S. 248, 257; *First Nat. Bank* v. *Williams*, 252 U. S. 504, 512. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. *Ibid.*; *Kings County* v. *Seattle School Dist.*, 263 U. S. 361, 363, 364. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (*New Orleans* v. *Benjamin*, 153 U. S. 411, 424; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184, 191; *Joy* v. *St. Louis*, 201 U. S. 332; *Denver* v. *New York Trust Co.*, 229 U. S. 123), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Taylor* v. *Anderson*, 234 U. S. 74. Indeed, the

complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, *supra*."

See also,

Spencer v. *Duplan Silk Co.* (1903), 191 U. S. 526, at 530.

The respondents meet none of the foregoing tests. Merely because a controversy arises out of or is incidental to a bankruptcy does not make it a federal question.

In this case the claimed violation of fiduciary duty is neither condemned by the Constitution nor by federal statute; the fact that the plaintiffs are trustees is not an essential element on which the result will turn nor is it a ground of federal jurisdiction. The causes of action, if any there be, were claims which the corporation or its stockholders could assert independently of bankruptcy and without reference to or reliance on the Constitution or federal laws. Accordingly, no federal question is involved.

B. Respondents are not officers of the United States.

The respondents have urged in the courts below that because they are "officers" of the reorganization court, and the reorganization court is a federal court, they are "officers" of the United States within the meaning of Section 24(1) of the Judicial Code, 28 U. S. C. § 41(1):

> "The district court shall have original jurisdiction as follows:
>
> First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue. * * *."

No one seems to have advanced the respondents' very novel proposition heretofore and citation of specific authority to

the contrary is difficult to assert. It is clear, however, that bankruptcy receivers are not officers of the United States. See *Gablemgn* v. *Peoria D. & E. R. Co.* (1900), 179 U. S. 335; *Pope* v. *Louisville, N. A. & C. Co.* (1889), 173 U. S. 513; *cf. Fleming* v. *Bowers* (S. D. N. Y., 1926), 11 F. (2d) 789.

It is plain that the United States is not suing the petitioners. The respondents, as trustees under Chapter X, are not United States Government officials, nor are they protecting any governmental interests. There are no interests of the United States at stake in this case.

It seems evident to us from a mere reading of the language of the statute that what was contemplated by the term "officer" was an officer acting *on behalf of* the United States to carry out a function that Congress has declared to be *a function of government.*

Respondents offer no rationale, but simply rely on the cases holding that a receiver of a national bank is an "officer" of the United States. *E.g., Pufahl* v. *Estate of Parks* (1936), 299 U. S. 217, 225; *Price* v. *Abbott* (D. Mass., 1883), 17 Fed. 506. But the receiver of a national bank is acting on behalf of the United States and is carrying out a function that Congress has said the government should execute. When a national bank is placed in receivership "the Comptroller of Currency [is] in possession of the business." *Jennings* v. *U. S. F. & G. Co.* (1935), 294 U. S. 216, 218. "But a receiver is appointed only when the condition of the bank or its practices make *intervention by the government* necessary for the protection of noteholders or other creditors." Mr. Justice Brandeis, in *United States* v. *Weitzel* (1918), 246 U. S. 533, 541. (Emphasis added.)

Congress has decided that where the condition of a national bank or the manner in which it is conducted demands the removal from power of the management in order to protect the interests of noteholders or other creditors, the Government should take over the management of the bank. And it has determined that the Comptroller of the Currency should be the one to act on behalf of the Government with the assistance of an agent, termed a "receiver." Congress

has not determined that where the condition of a corporation is such as to necessitate reorganization or bankruptcy proceedings the United States should intervene.* It has, under its bankruptcy powers, afforded a judicial forum in which such proceedings may take place, and it has authorized that forum to appoint a person to manage the business of the debtor during the proceedings. But by so doing it did not erase the distinction between officers of the United States and officers of the court: a receiver for a national bank is an officer of the United States, a trustee in bankruptcy is an officer of the court. *In re Chetwood* (1897), 165 U. S. 443, 457; *Porter* v. *Sabin* (1893), 149 U. S. 473, 479; *Wheeler* v. *Greene* (1929), 280 U. S. 49, 51; *Oosterhuis* v. *Palmer* (C. C. A. 2d, 1943), 137 F. (2d) 322, 325; *Lawrence National Bank* v. *Rice* (C. C. A. 10th, 1936), 83 F. (2d) 642, 643; *Lehman* v. *Spurway* (C. C. A. 5th, 1932), 58 F. (2d) 227, 228; *Davis* v. *McFarland* (C. C. A. 5th, 1926), 15 F. (2d) 612, 613; *Wittnebel* v. *Loughman* (S. D. N. Y., 1935), 9 F. Supp. 465, 467, aff'd 80 F. (2d) 222, cert. den. 297 U. S. 716.

The very cases on which the respondents have relied emphasize this distinction, *e.g.*, Mr. Justice Brandeis in *United States* v. *Weitzel* (1918), 246 U. S. 533, 540-41:

> "The Comptroller of the Currency is charged with the duty of supervising national banks. When he deems it necessary to take possession of the assets of the bank and assume control of its operations he appoints a receiver under Rev. Stats., § 5234.
>
> * * * * *
>
> "The receiver, unlike a president, director, cashier or teller, is an officer not of the corporation but of the United States. *In re Chetwood*, 165 U. S. 443, 458. As such he gives to the United States a bond for the faithful discharge of his duties; he pays to the Treasurer of the United States the money collected; and makes to the Comptroller reports of his acts and proceedings. Rev. Stats., § 5234. Being an officer of the

* The Securities and Exchange Commission is authorized to participate for certain purposes in the reorganization proceedings, but not in suits such as this. Bankruptcy Act, Section 172; 11 U. S. C. § 572. The trustees are not officials of the SEC.

> United States he is represented in the court by the United States attorney for the district subject to the supervision of the Solicitor of the Treasury, § 380. *Gibson* v. *Peters*, 150 U. S. 342. * * *."

See also,

Kennedy v. *Gibson* (1869), 8 Wall. 498, 504-505.

We do not, of course, assert that the United States must have a proprietary interest in the outcome of the litigation in order for jurisdiction to exist under Section 24(1); we do contend that its officers must be asserting either a proprietary right or a regulatory function of the government as dictated by Congress. Whether this regulatory function be entrusted by Congress to the Secretary of the Treasury, the Secretary of the Interior or any other government official, a receivership as an incident thereto is protection of a national interest under government authority and such a receiver becomes an officer of the executive branch of the United States Government. And we contend further that no such governmental interest exists in this case; and jurisdiction may not be based on Section 24(1) of the Judicial Code. Any ruling contrary to these views would result in opening a new field of federal jurisdiction more significant than any grant by Congress in over half a century. Specific congressional language should be required for such a result.

POINT III.

THE JUDGMENT BELOW SHOULD BE REVERSED.

There is no legislative basis for federal jurisdiction of this case. The presumed nature of the conduct of the petitioners developed *ex parte* and allegedly giving rise to this suit is mentioned in the opposing briefs as though that might aid a finding of jurisdiction. Self-evidently, the characterization of the conduct has no bearing on the issue of jurisdiction.

Considerations of policy urged by the respondents as desirable cannot enlarge the congressional grant of jurisdiction to the court nor be a substitute for legislative act. Section 2 of the Bankruptcy Act of 1898 has been repeatedly and uniformly construed by the courts and is not ambiguous. The only relevance of arguments of policy can be to suggest what Congress might do or might have done. If jurisdiction is conferred by statute, the argument of what is desirable policy is superfluous. If jurisdiction has been withheld by Congress, such contentions amount merely to a criticism of congressional wisdom.

In *Price* v. *Gurney* (1945), 324 U. S. 100, the plaintiff failed to meet the legislative requirements for jurisdiction prescribed by Chapter X of the Bankruptcy Act. He urged that considerations of federal policy would be served best and meritorious claims would be enforced if the court nevertheless accepted jurisdiction. Mr. Justice Douglas (who, as an SEC Commissioner, urged the need of Chapter X), expressed sympathy for the plaintiff's position, but found no legislative basis for jurisdiction and so concluded:

> "The creation of a new basis of Federal jurisdiction * * * is a legislative act" (p. 107).

There is no affirmative policy to enlarge federal jurisdiction to which this court has subscribed as intimated by the respondents and the *amicus curiae*. The policy is rather to leave state issues to state courts.

If there is any basis in fact for this suit, the state court is the proper forum.

> "The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice."

Lathrop v. *Drake* (1875), 91 U. S. 516, 518.

The state courts afford an adequate forum for such suits. *Hastings* v. *Byllesby & Co.* (1941), 286 N. Y. 468.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

The BANKRUPTCY ACT OF 1898, as amended, provides:

Sec. 1(9); 52 Stat. 840; 11 U. S. C. § 1(9)

"MEANING OF WORDS AND PHRASES.—The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * *;

"(9) 'Court' shall mean the judge or the referee of the court of bankruptcy in which the proceedings are pending; * * *"

Secs. 2a and 2a(7); 52 Stat. 842; 11 U. S. C. §§ 11(a) and 11a(7)

"CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to— * * *

"(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate, whenever under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; * * *"

Sec. 23; 52 Stat. 854; 11 U. S. C. § 46

"JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States district courts shall have juris-

diction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in §§ 60, 67, and 70 of this Act."

Sec. 101; 52 Stat. 883; 11 U. S. C. § 501

"The provisions of this chapter shall apply exclusively to proceedings under this chapter."

Sec. 102; 52 Stat. 883; 11 U. S. C. § 502

"The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That § 23, subdivisions h and n of § 57, § 64, and subdivision f of § 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under § 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered."

Sec. 111; 52 Stat. 884; 11 U. S. C. § 511

"Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Sec. 114; 52 Stat. 884; 11 U. S. C. § 514

"Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication."

Sec. 115; 52 Stat. 884; 11 U. S. C. § 515

"Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties herein and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

The JUDICIAL CODE, as amended, provides:

Sec. 24(1) (in part); 36 Stat. 1091; 28 U. S. C. § 41(1) (in part)

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, * * * ".

Sec. 24(19); 36 Stat. 1093; 28 U. S. C § 41(19)

"The district courts shall have original jurisdiction as follows:

"Nineteenth. Of all matters and proceedings in bankruptcy."

Sec. 256(Sixth); 36 Stat. 1161; 28 U. S. C. § 371 (Sixth)

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: * * *

"Sixth. Of all matters and proceedings in bankruptcy."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 859.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORNACK, JOHN H. ECCLES, CLARENCE F. DILLON, OTTO A. PHILIPPP and HUGH B. BAKER,

Petitioners,

against

CARL J. AUSTRIAN and ROBERT C. BUTCHER, as Trustees of CENTRAL STATES ELECTRIC CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF.

The respondents and the *amicus curiae* have failed to appreciate and integrate their arguments with the jurisdictional scheme under the bankruptcy acts. This may be summarized briefly as follows:

Under the Bankrupt Acts of 1841 and 1867, the federal district and circuit courts were given general jurisdiction over all plenary suits at law and in equity involving assignees

(trustees). By separate section, in each Act, the district court was given summary jurisdiction over bankruptcy proceedings.

The dissatisfaction with the expansive federal power over suits by trustees at law and in equity, and the excessive burden therefrom on litigants and on the federal courts, resulted in sharply restricted federal jurisdiction over such suits under the Bankruptcy Act of 1898.

In the Act of 1898, the district courts were given no jurisdiction at all over plenary suits by trustees at law or in equity, except jurisdiction by consent of the defendant. Section 23-b. The function of the district court, under the Act of 1898, absent consent of the defendant was restricted to sitting as a court of bankruptcy and exercising the summary bankruptcy powers listed in Section 2. This jurisdiction was, however, exclusively federal.* Judicial Code Section 256 (as am.) "Sixth". The jurisdiction of the bankruptcy court over bankruptcy proceedings as set forth in Section 2 of the Act of 1898, has not been changed up to the present time, except to add additional instances in which the bankruptcy court may exercise summary jurisdiction. *Cf.* subdivisions 20, 21. On the other hand, the circuit courts were granted jurisdiction over plenary suits by trustees, brought at law or in equity, but only to the same extent as though bankruptcy proceedings had not been instituted and as though the bankrupt, and not the trustee, were the party litigant.

Until 1911, the Bankruptcy Act afforded no jurisdiction (except consent jurisdiction) to the district courts over law or equity cases brought by trustees and based on state-created rights. Jurisdiction in suits by trustees based on federally-created rights was granted by amendments to the Bankruptcy Act in 1903 and 1910, viz., Sections 60b, 67e and 70e(3). These additional provisions permitted suits by

* The briefs of the respondents and the *amicus curiae* significantly have no answer to our argument that a finding of jurisdiction for this suit in Section 2 makes all such claims exclusively federal.

trustees on federal rights therein specified in federal district courts as well as in state courts.

In 1911 the circuit court was abolished and its jurisdiction was transferred to federal district courts. This resulted in investing the district courts with all general federal jurisdiction under the Judicial Code and with jurisdiction under the Bankruptcy Act over suits at law or in equity by trustees to the same extent as though bankruptcy had not intervened and the bankrupt were the litigant. Additionally, the district courts continued to have the consent jurisdiction under Section 23-b.

In 1938, prior to enactment of Chapter X, the scope of jurisdiction was therefore as follows: The *bankruptcy* court had no jurisdiction to deal with plenary suits brought by the trustee at law or in equity and based on state-created rights, except on consent of the defendant. The *district* courts generally could entertain plenary suits by trustees at law or in equity based on state-created rights only if a federal ground of jurisdiction were present or if the defendant consented to be sued.

Upon enactment of Section 115 of Chapter X, the jurisdiction of the reorganization court proper over plenary suits at law or in equity commenced by the trustee, based on state-created rights, was enlarged from a consent jurisdiction to a jurisdiction to the extent available to equity receivers, without requirement of consent or diversity of citizenship or federal question or requisite amount. This was accomplished by giving to the reorganization court, the court where the petition was filed, the powers of equity receivership courts. Accordingly, by the elimination from Chapter X of Section 23, the federal equity rule became applicable in the home or reorganization court, if the judge invested the trustee with the rights and powers of an equity receiver as provided in Section 187. The general district court jurisdiction in suits at law or in equity by reorganization trustees was reduced by elimination of the consent jurisdiction in Section 23. However, the jurisdiction of the reorganization court was the prime consideration.

Consequently, plenary suits on state-created rights in federal courts other than the reorganization court, by trustees appointed under Chapter X must conform to the jurisdictional requirements of the Judicial Code.

Respectfully submitted,

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(7986)

ALBERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

RELEVANT SECTIONS OF THE BANKRUPTCY ACT OF 1898 AS CONSTRUED BY RESPONDENTS.*

Sec. 1(7); 30 Stat. 544.
(as enacted in 1898)

"SECTION 1. MEANING OF WORDS AND PHRASES.—a. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: * * * (7) 'court' shall mean ~~the~~ [*any*] court of bankruptcy ~~in which the proceedings are pending,~~ and may include the referee; * * *."

Sec. 2; 30 Stat. 544, 545.
(as enacted in 1898)

"SEC. 2. That the courts of bankruptcy as hereinbefore defined * * * are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, ~~in vacation in chambers and~~ during their respective terms, as they are now or may be hereafter held, * * *."

Sec. 23(a); 30 Stat. 544, 552.
(as enacted in 1898)

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JAN 31 1947

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 850.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORNACK, JOHN H. ECCLES, CLARENCE F. DILLON, OTTO A. PHILIPP and HUGH B. BAKER,

Petitioners,

—against—

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CARL J. AUSTRIAN,
Attorney for Respondents.

ROBERT G. BUTCHER,
SAUL J. LANCE,
GEORGE H. SCHWARTZ,
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Of Counsel.

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Petitioners,

—against—

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Question Presented.

The sole question involved is whether a Chapter X trustee, having discovered in the course of his investigations pursuant to section 167 of the Bankruptcy Act causes of action against the management of a debtor and affiliated interests, and having been specifically authorized by the Bankruptcy Court to bring suit thereon in a district court of the United States other than that in which the petition for reorganization was filed and the reorganization is pending, may bring such a plenary

suit in that other district regardless of whether there is diversity of citizenship.

The court below found jurisdiction in section 2 of the Bankruptcy Act (section 23 having been made inapplicable by section 102) and therefore did not consider the other grounds of jurisdiction urged by respondents.

Statement.

It is respondents' position that, apart from its interlocutory character,[1] the decision of the court below does not warrant further review because it is clearly correct and not contrary to decisions of this Court[2] or of other circuits.[3]

Respondents are the Trustees of Central States Electric Corporation[4] appointed by the United States District Court for the Eastern District of Virginia in Chapter X proceedings now pending in that Court. These Trustees were appointed after the decision of the Fourth Circuit Court of Appeals in the *Matter of Central States Electric*

[1] The fact that the decision below is interlocutory is of itself sufficient basis for the denial of the writ. If the district court had found jurisdiction that decision, right or wrong, would not have been reviewable until final judgment. The mere fact that the decision sustaining jurisdiction was made by the court below should not operate to allow piecemeal review which would otherwise not have been permissible.

[2] *Lathrop* v. *Drake*, 91 U. S. 516 (1875); *Babbitt* v. *Dutcher*, 216 U. S. 102 (1910); see *Bardes* v. *Hawarden Bank*, 178 U. S. 524 (1900), and *Schumacher* v. *Beeler*, 293 U. S. 367 (1934).

[3] Petitioners do not claim that there are conflicting decisions in other circuits. They merely guess that there may be such conflicts in the future. That is no basis for the granting of a writ in this case.

[4] Hereinafter variously referred to as "Central States" or as the "Debtor".

Corporation, 143 F. 2d 684 (1944). That Court stated at page 686:

> "The great losses sustained by the corporation, the gross mismanagement shown, the clear abuse of power by corporate officers in contracts made for and with the corporation, the recommendation of the governmental agency charged with the supervision of matters of this sort,—all of these called for an investigation of the most complete and thorough-going character, with opportunity to examine under oath those who had knowledge of the corporation's affairs and with institution of suits for recovery, where probable liability had been shown, to the end that all of the processes of discovery provided by law might be fully used. * * *"

Pursuant to that direction, respondents, as Trustees of Central States, conducted an investigation under section 167 of the Bankruptcy Act into the acts and conduct of the former management of Central States. That investigation disclosed facts indicating that petitioners—the defendants in this action—as officers, directors, and controlling stockholder of Central States, together with other conspiring parties, had wrongfully abused the Debtor and had engaged in shocking conduct against the investing public. Upon discovery of these facts, the United States District Court for the Eastern District of Virginia authorized and directed that the Trustees-respondents institute this action in the Southern District of New York.

The complaint alleges that petitioners conspired to waste, destroy, misappropriate and otherwise improperly deal with the property and assets of the Debtor and that petitioners were guilty of breaches of trust and waste of assets. Respondents seek an accounting for

the asset losses and profits involved in these transactions and claim damages of upwards of $39,000,000, exclusive of interest.

The district court granted the motion of respondents to dismiss the complaint upon the ground that the court lacked jurisdiction of the subject matter of the action. The court below reversed and sustained the jurisdiction.

The question thus presented to this Court is whether a Chapter X trustee, in carrying out the duties and functions of his office under the federal statute governing corporate reorganizations, may bring a plenary action against adverse claimants to recover assets of the estate in a district court other than the one in which the reorganization proceeding is pending, regardless of diversity of citizenship.

This is precisely the kind of case which Congress envisaged when it enacted Chapter X and granted jurisdiction to the district courts of such suits.[5] As the Securities and Exchange Commission stated in its brief in

[5] Petitioners' arguments that the decision below would open the federal courts to a flood of "$20 claims" is not persuasive. Certainly, the present suit involves a larger amount ($39,000,000). And it clearly is the exact Chapter X suit arising out of a Chapter X investigation by a Chapter X trustee which Congress had in mind in sections 167 and 102. Nor are we impressed with the fear that Chapter X trustees will burden the federal courts with ordinary claims of $20—or less. We may assume, despite the dire consequences forecast by petitioners, that the district judges will control their trustees as to choice of forum and make appropriate directions for suit in state courts on ordinary claims. Our case is of the same *genre* as those fraudulent preferences and conveyances involved in sections 60, 67 and 70, of which the district courts have jurisdiction in actions by all trustees. We are not aware that this grant of jurisdiction has resulted in any abuse, or "flood" of suits, despite the fact that Congress has not limited the jurisdiction as to the amount involved. Obviously, that trustees have not brought suits to set aside $20 transfers is due to reasons of business and administrative practicality which are valid without regard to jurisdiction. The mere right to sue in the federal courts thus does not prove that suits will be brought there—or anywhere.

the court below in support of the jurisdiction of the district court:

> "The cause of action alleged in the instant case, like the typical claim which the Chapter X trustee has a duty to investigate and prosecute, is the counterpart in large corporate affairs of the old-fashioned fraudulent-conveyance. The basic charge is that the management, affiliated with the equity interests, has enriched itself at the expense of the debtor thereby depleting the funds otherwise available for creditors and other public security holders."[6]

Argument.

1. Petitioners seek to convey the impression that the claims are stale,[7] and that the decision below is novel and constitutes a far-reaching innovation in the law of federal jurisdiction. There is nothing novel about this situation. The fact is that Congress, as a reference to the legislative history of the enactment of Chapter X shows, was very much concerned with precisely this sort of litigation arising out of wrong-doings and inequities perpetrated upon a corporation by its management and "insiders". It was notorious, prior to the enactment of Chapter X, that in the reorganizations of corporations such kinds of wrong-doing had been glossed over and hidden by the very malefactors who, one way or another, finally controlled the reorganization proceeding itself to the ultimate end of escaping responsibility for their frauds.

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[6] See Brief for the Securities and Exchange Commission, *Amicus Curiae* (October, 1946), page 46, note 29.

[7] The district court, however, stated that in view of the allegations of fact in the complaint the question of limitations should await the trial of the action.

One of the prime purposes which motivated Congress in enacting Chapter X was to remedy this situation, provide a machinery for the ferreting out of old corporate abuses, provide for a more effective machinery for the prosecution of actions, and the redress of such wrongs. And to that end, Congress provided in Chapter X for the independent trustee with broad powers of investigation (section 167) and specifically removed (by section 102) the then existing restrictions (section 23) on the jurisdiction of actions by trustees in bankruptcy. This reference to legislative history and the purpose of the enactment of Chapter X are well stated in the opinion of the court below:

> "Chapter X was enacted largely because of the many abuses which developed in reorganizations under §77B. One of these was the retention of control over the debtor corporation during reorganization by 'insiders' who frequently sought to conceal and to prevent vigorous prosecution of possible causes of action against the debtor's former management. Report on Protective and Reorganization Committees, Pt. I, S.E.C., 1937, 865; N. Y. Leg. Doc. No. 66, 159th Sess., 1936, 22; Note, 50 Yale L.J. 1492, 1496. To combat this and other abuses the draftsmen of Chapter X strengthened the hand of the reorganization trustee by giving him access to lists of the debtor's security holders, in whosever hands they may be, §165, 11 U.S.C.A. §565, by placing upon him the duty of formulating the plan of reorganization, §169, 11 U.S.C.A. §569, and perhaps most important, by giving him broad powers of scrutiny of the conduct of the debtor's business by the debtor's former management, §167, 11 U.S.C.A. §567. In view of the Congressional purpose demonstrated by these provisions, it seems clear that in eliminating §23 from corporate

reorganizations under Chapter X, Congress intended to enlarge, rather than restrict, the trustee's choice of forum in prosecuting causes of action against former controllers of the debtor. This is the view of Professor Moore and of Mr. Gerdes. 6 Collier on Bankruptcy, 14th Ed., §3.20 (containing specific criticism of the opinion of the district court); 2 *id.*, §23.12; Moore's Bankruptcy Manual, 1939, 494; Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act*, 52 Harv. L. Rev. 1, 21."

2. With the removal of section 23 the grant of general jurisdiction contained in section 2 remains unimpaired. Section 2-a(7) gives the district courts general jurisdiction at law and in equity in proceedings under the Act to "* * * cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto except * * *" where otherwise provided in the Act.[8] This jurisdiction is as broad as that granted under the corresponding section 1 of the Bankruptcy Act of 1867 (*Babbitt* v. *Dutcher*, 216 U. S. 102, 107 (1910)). Section 1 of the Act of 1867 was a grant of general plenary jurisdiction of suits to which a trustee in bankruptcy was a party without regard to diversity or amount in controversy. This jurisdiction was held to extend to every district court and was not limited to the district court in which the petition in bankruptcy had been filed. *Lathrop* v. *Drake*, 91 U. S. 516 (1875); *Shearman* v. *Bingham*, 7 Nat. Bank. Reg. 490,

[8] That section 23 was the limitation envisaged by Congress in the "except" clause in section 2 has been many times stated by this Court. *Bryan* v. *Bernheimer*, 181 U. S. 188 (1901); *First Nat. Bank* v. *Title & Trust Co.*, 198 U. S. 280 (1905); *Whitney* v. *Wenman*, 198 U. S. 539 (1905); *Kelly* v. *Gill*, 245 U. S. 116 (1917).

Fed. Cas. No. 12762 (1872); *Goodall* v. *Tuttle*, 10 Fed. Cas. 579, W. D. Wis. (1872); *Babbitt* v. *Dutcher*, *supra*, at p. 111.

In an endeavor to escape the jurisdiction thus established, petitioners have attempted to place the jurisdiction in section 23 which they assert is the sole grant of plenary jurisdiction and deny that any plenary jurisdiction whatsoever is contained in section 2. They rely for this contention on dicta in *Bardes* v. *Bank*, 178 U. S. 524 (1900) and *Schumacher* v. *Beeler*, 293 U. S. 367 (1934). Admittedly, when section 23 exists, it affects the jurisdiction of the district courts of plenary suits brought by trustees in bankruptcy. When the question of the jurisdiction of the district courts of such suits by ordinary trustees in bankruptcy was presented to this Court in cases involving the Bankruptcy Act of 1898, it made no difference whether the jurisdiction was placed precisely in 2 or 23 or in both together, since the two sections determined the scope of jurisdiction. The *Bardes* and *Schumacher* cases, decided when the Act contained both sections 2 and 23, thus did not pass on the scope of the jurisdiction contained in 2 alone. Accordingly, any statements in those cases as to the source of jurisdiction where section 2 is alone involved, are *dicta* and not decisive of the issue—as the Court below very properly pointed out.[9] Contrary views on this point were expressed by way of *dictum* in another decision of this Court under the 1898 Act. (*Babbitt* v. *Dutcher*, *supra*, 107, 111.)

In the final analysis, it is unnecessary to decide precisely what effect section 23 actually had when it and section 2 were both in effect because section 23 was removed from

[9] This Court has itself pointed out that the *Bardes* case contains erroneous *dicta* on other matters of bankruptcy administration (*Bryan* v. *Bernheimer*, 181 U. S. 189, 197).

proceedings under Chapter X by section 102. With the removal of section 23, section 2 must be given effect according to its plain language unless a contrary Congressional intent appears. That there is no such contrary intent is made clear by the Court below as follows:

> "In view of the Congressional purpose demonstrated by these provisions, it seems clear that in eliminating section 23 from corporate reorganizations under Chapter X, Congress intended to enlarge, rather than restrict, the Trustee's choice of forum in prosecuting causes of action against former controllers of the debtor."

The argument of petitioners that section 2 is not a grant of jurisdiction of plenary suits rests entirely on the construction of the word "proceedings" in section 2. It is urged that irrespective of the context in which the term appears in the Act it applies only to the summary steps in a bankruptcy administration.[10] There is no basis for this argument which is an unwarranted attempt to define the term "proceedings" restrictively. An analysis of various portions of the Bankruptcy Act will readily show that the term "proceedings" is used interchangeably with "suit" or "action". Thus, section 11e of the Bankruptcy Act authorizes trustees to "institute proceedings in behalf of the estate upon any claim". And in another connection, the same section refers to "any proceedings,

[10] This construction leads petitioners to the fallacious contention that the decision below would deny a jury trial in all actions brought by Chapter X trustees. Obviously, the right to a jury trial will be determined in such actions by the same rules which govern any ordinary plenary suit brought in a federal court. Bankruptcy Act, Sec. 19(c), 11 U. S. C. A. 42(c); *Wm. Edwards Co.* v. *La Dow*, 230 F. 378, 381 (C. C. A. 6, 1916); *In re Russell*, 101 F. 248, 251 (C. C. A. 2, 1900); *Smith* v. *Mason*, 14 Wall. 419, 432 (1871); Cf. *Marshall* v. *Knox*, 16 Wall. 551, 556, 1872. See *Galbraith* v. *Vallely*, 256 U. S. 46, 50 (1921).

judicial or otherwise". Obviously, as the term "proceedings" is used in section 11e, it refers to and includes a suit or action.

So also sections 60b, 67e and 70e(3) of the Act, dealing with preferences and fraudulent conveyances, confer upon the district courts, and upon state courts, concurrent jurisdiction over certain "plenary proceedings". Plainly, the term "proceedings" in these sections refers to and includes suits or actions. Indeed in discussing the provisions of section 70e(3), the Congressional Committee used both terms "action" and "proceeding" interchangeably (H. Rep. 1409, 75th Cong., 1st Sess., pp. 20, 35), and the bill described the plenary actions thereunder as "proceedings" (Id., p. 96).

As a matter of fact, section 2 creating jurisdiction in "proceedings" also provides in subdivision 7 for the determination of "controversies" in relation to the collection of the estates of bankrupts. That "controversies" in this context includes plenary suits is clear from the fact that the same term is used in section 23—which petitioners concede deals with plenary suits.

Finally, a consideration of section 102 shows the fallacy of petitioners' argument. Section 102 incorporates Chapters I to VII in reorganization "proceedings". If "proceedings" in section 2 is limited entirely to the summary steps in the administration of a reorganization, then it follows that a Chapter X trustee has no power to institute a suit or an action. However, by virtue of section 102, it is clearly contemplated that a Chapter X trustee will institute suits or actions to set aside preferences and fraudulent transfers as provided in sections 60, 67 and 70 of the Act. Indeed, section 60 (in subdivision a) and section 67 (in subdivisions a(1), a(2), b, c, d(2) and d(3)) directly and by express wording refer to actions by a Chapter X trustee to avoid such fraudu-

lent preferences and transfers. Moreover, if a Chapter X proceeding involved only an administration and not the bringing of actions by a trustee there would have been no point in specifically excluding section 23 (which clearly deals with actions) from reorganization proceedings under Chapter X.

This analysis of the various portions of the Bankruptcy Act dealt with above shows that there is no basis for the argument of petitioners that the term "proceedings" must be given a restrictive meaning. On the contrary, the congressional intent is clear that the term "proceedings" includes suits or actions.

CONCLUSION.

The decision of the court below is clearly correct and no questions are presented which warrant consideration by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 850.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. McCORNACK, JOHN H. ECCLES, CLARENCE F. DILLON, OTTO A. PHILIPP and HUGH B. BAKER,

Petitioners,

—against—

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 850.

HARRISON WILLIAMS, CLIFFORD F. STONE, SIDNEY J. WEINBERG, WADDILL CATCHINGS, JOHN FOSTER DULLES, WALTER E. SACHS, HENRY S. BOWERS, CLINTON M. FINNEY, JAMES F. FOGARTY, HERBERT C. FREEMAN, JOHN B. NIVEN, HENRY E. MENDES, FRANCIS J. CLOWES, VICTOR H. STEMPF, EDWIN H. WAGNER, SR., ROBERT C. BROWN, WILLIAM C. BECHERT, JACOB P. FRIEDMAN, ALBERT E. PARDEE, RALPH JONAS, LOUIS E. KILMARX, CHRISTIAN A. JOHNSON, DAVID G. MCCONNACK, JOHN H. ECCLES, CLARENCE F. DILLON, OTTO A. PHILIPP and HUGH B. BAKER,
Petitioners,

—against—

CARL J. AUSTRIAN and ROBERT G. BUTCHER, as Trustees of Central States Electric Corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF.

Opinions Below.

The opinion of the United States District Court (R. 127) is reported in 67 Fed. Supp. 223. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 142) is reported in 159 Fed. (2) 67.

Jurisdiction.

The order and judgment of the Court of Appeals for the Second Circuit was filed December 10, 1946 (R. 149). The petition for a writ of certiorari was filed January 4,

1947 and was granted on February 10, 1947 (R. 151). The jurisdiction of this Court rests upon Judicial Code section 240(a), 28 U. S. C. section 347(a), as amended by the Act of February 13, 1925.

Question Presented.

The sole question involved is whether a Chapter X trustee, having discovered in the course of his investigation, pursuant to section 167 of the Bankruptcy Act, causes of action against the management of a debtor and affiliated interests, and having been specifically authorized by the Bankruptcy Court to bring suit thereon in a district court of the United States other than that in which the petition for reorganization was filed and the reorganization is pending, may bring such a plenary suit in that other district regardless of whether there is diversity of citizenship.

Statement of the Case.

Central States Electric Corporation,[1] a Virginia corporation, is a Debtor in reorganization proceedings in the District Court for the Eastern District of Virginia. Sometime in 1943, its former trustees reported to the Reorganization Court that numerous wrongs and frauds appeared to have been perpetrated against the estate of the Debtor by certain persons, firms and corporations. They recommended, however, that no suit be instituted to redress these frauds because, in their opinion, the statutes of limitation of the states where suit could be brought barred relief.

The Court of Appeals for the Fourth Circuit did not agree with these views (See *Committee for Holders of Central States, etc.* v. *Kent*, 143 Fed. (2) 684), because (at p. 686):

> "The great losses sustained by the corporation, the gross mismanagement shown, the clear abuse of power by corporate officers in contracts made for and with

[1] Referred to throughout this Brief as the "Debtor".

> the corporation, the recommendation of the governmental agency charged with the supervision of matters of this sort,—all of these called for an investigation of the most complete and thorough-going character, with opportunity to examine under oath those who had knowledge of the corporation's affairs and with institution of suits for recovery where probable liability had been shown, to the end that all of the processes of discovery provided by law might be fully used. . . ."

Respondents were then appointed trustees and conducted an investigation (under section 167 of the Bankruptcy Act) into the conduct of the former management and affiliated interests. That investigation disclosed that petitioners, as officers, directors and controlling stockholder, together with other conspiring parties, had looted the estate of the Debtor and had engaged in shocking conduct against the public security holders of the Debtor. Pursuant to the direction of the Reorganization Court, this action was begun in the District Court for the Southern District of New York by the filing of the complaint seeking restitution of upwards of $39,000,000.

Respondents have not answered the complaint. On October 1 and October 5, 1945—three months after the filing of the complaint—they moved for an order of dismissal on the ground that the Southern District Court of New York had no jurisdiction of the subject matter of the action and on the further ground that the transactions complained of were so stale as to be barred by the New York statute of limitations.

After considering the matter for almost seven months, the District Court rendered an opinion finding that it had no jurisdiction of the subject matter. It did not, therefore, reach the question as to the staleness of the claims. However, it stated that if it had found jurisdiction, it would have denied the motion to dismiss on the ground of limitations in view of the issues of fact presented by the complaint.

An appeal was promptly taken by respondents to the

Second Circuit Court of Appeals, which, on December 10, 1946, found that the Southern District Court of New York had jurisdiction of the subject matter of the action, and, accordingly, reversed the order and judgment of the District Court.

July 5, 1947, will be two years from the date when respondents filed their complaint in the District Court. As of today, the only progress in the litigation has been a determination by the Second Circuit Court of Appeals that the District Court had jurisdiction to entertain the suit—a conclusion which we think has been abundantly clear from the outset and which is the only issue presented on the present writ.

Statutes Involved.

The various statutes to which reference may be made will be found in the Appendix, *infra*, pp. 43 *et seq.*

Summary of Argument.

The Court of Appeals found jurisdiction in section 2(a)7 of the Bankruptcy Act, and reversed the District Court which had sustained the contention of the petitioners that such jurisdiction could be found only in section 23 of the Act, and that since section 23 has been declared inapplicable to Chapter X, the court had no jurisdiction at all.

We believe that the court below was correct in finding jurisdiction in section 2(a)7. We go further and argue that such jurisdiction also exists under section 115 of the Bankruptcy Act, conferring equity jurisdiction; under Judicial Code section 24(1), granting jurisdiction of suits arising under the laws of the United States; under Judicial Code section 24(19), granting jurisdiction of "matters and proceedings" in bankruptcy; and under Judicial Code section 24(1), granting jurisdiction of suits brought by officers of United States.

Petitioners urge that section 2 merely confers jurisdiction to administer the bankruptcy estate and does not contain a grant of jurisdiction to any district court

over ordinary civil actions. This argument rests on two grounds: a narrow interpretation of the language of section 2 ("proceedings") and on the assumption that section 23 is the sole source of plenary jurisdiction. We argue that section 2 contains a broad grant of jurisdiction to all the district courts over ordinary civil actions brought by trustees in bankruptcy; that section 23 is a limitation thereon; and that this limitation is removed, as respects Chapter X trustees, by section 102.

Insofar as section 115 of the Bankruptcy Act is concerned, petitioners deny that the equity jurisdiction there conferred runs to any district court other than to "the court" in which the petition for reorganization was filed. We believe this interpretation to be erroneous, and that the grant of jurisdiction in section 115 to "the court" is a grant to the Court of Bankruptcy—which means every district court of the United States.

As to the scope of the Judicial Code, petitioners deny any jurisdiction thereunder on the ground that this case does not depend on a construction of any federal law (*Gully* v. *First National Bank*, 299 U. S. 109). The answer is that this case does arise under the laws of the United States, and that the *Gully* case does not apply where, as here, Congress has constitutionally conferred jurisdiction on the district courts of actions by trustees in bankruptcy.

Finally, we urge that Chapter X trustees are officers of the United States and as such are entitled to bring this suit. We find no support for the argument of petitioners which would limit the officers described in Judicial Code section 24(1) to officers appointed only by the Executive Branch of the Government.

ARGUMENT.

I.

A. Section 2 of the Bankruptcy Act Confers Jurisdiction on the District Courts of This Cause of Action.

Section 2(a) of the Bankruptcy Act gives the district courts "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, * * * to— * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, * * *."

By its terms this section is very broad and includes a grant of plenary jurisdiction to all the district courts. The lower court, as well as other authorities, agree with our view.[2] Further support for this conclusion will also be found in decisions of this Court and lower federal courts construing section 1 of the Bankruptcy Act of 1867, which is practically identical with section 2 of the Bankruptcy Act of 1898.[3] In these cases it was held that section 1 of the Act of 1867 contained a grant to all the district courts of the United States (and not merely the district court in which the bankruptcy proceeding was pending) of plenary jurisdiction of suits to which a bank-

[2] See, *e. g.*, *6 Collier on Bankruptcy* (14th Ed.), section 3.20, *2 id.*, section 23.12; *Moore's Bankruptcy Manual*, 1939, 494; *Collier on Bankruptcy* (11th Ed. 1917), p. 68 ("* * * the power conferred by this subdivision appears to be plenary"); *Ross, Federal Jurisdiction in Suits by Trustees in Bankruptcy*, 20 Iowa L. Rev. 565, 566, 567 (1935); *Lynch* v. *Bronson*, 160 Fed. 139, 140 (D. Conn., 1908); *cf. Goodall* v. *Tuttle*, 10 Fed. Cas. 579, 580, 582 (W. D. Wis., 1872).

[3] The identity of the two Acts has been recognized by this Court in *Babbitt* v. *Dutcher*, 216 U. S. 102 and in *Barnes* v. *Hanvarden Bank*, 178 U. S. 524, 534. It will be recalled that Mr. Chief Justice Fuller, speaking for a unanimous Bench, has said that the jurisdiction granted in section 2 (of the Act of 1898) was as broad as that granted in section 1 of the Act of 1867. (*Babbitt* v. *Dutcher*, 216 U. S. 102, 107.)

ruptcy trustee was a party [*Lathrop* v. *Drake*, 91 U. S. 516 (1875); *Shearman* v. *Bingham*, 7 Nat. Bank Reg. 490; Fed. Cas. 12762 (1872); *Goodall* v. *Tuttle*, 10 Fed. Cas. 579 (W. D. Wis. 1872)][4]. It follows, therefore, that section 2 of the present Act contains a similar grant of plenary jurisdiction. This Court has already said so [*Babbitt* v. *Dutcher*, 216 U. S. 102, 111 (1909)][5].

Petitioners seek to escape from the thrust of this logic by contending that the jurisdiction of the district courts under the Act of 1867 was found not in section 1 but in section 2 of that Act—a section which was not carried over into the Act of 1898—and which provided only that the circuit courts should have concurrent jurisdiction with the district courts of all suits at law or in equity brought by an assignee in bankruptcy. This argument is rested on a dictum in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 532, later repeated in *Schumacher* v. *Beeler*, 293 U. S. 367, 372, a dictum which will not withstand the scrutiny of history or analysis of the authorities claimed for its support. To this history and analysis we now turn for the proof that petitioners' argument is unfounded and that the jurisdiction of the district courts under the Act of 1867 was rested in section 1 of that Act and not in section 2.

[4] There, after reviewing the acts of 1841, 1867, and the cases arising thereunder, it was said: "* * * On the authority of these decisions it must be and is conceded that under the bankruptcy acts of 1841 and 1867 ancillary jurisdiction, *both in summary proceedings and in plenary suits, existed in all District Courts* within their respective districts; and the question really is whether the provisions of the act of 1898 are to the contrary, or, * * * show an intention on the part of Congress to restrict such jurisdiction so as to cut off the inferences drawn from the language of the earlier acts.

"But neither the act of 1867, nor the act of 1898, expressly confers or expressly negatives ancillary jurisdiction in courts other than the court of adjudication * * *.

"But the general jurisdiction was not restricted by those provisions [*i. e.*, §§ 23a and b, 60(b), 67(e)], though they operated to mitigate the rigor of the rule laid down in the *Bardes* case. * * *.

"There is no decision of this court adverse to the ancillary jurisdiction of the District Courts as asked to be exercised in this case. * * *" (Emphasis ours.)

Prior to the date of decision in *Lathrop* v. *Drake*, 91 U. S. 516, it had been held by the lower federal courts that under section 1 of the Bankruptcy Act of 1867 all the district courts of the United States had jurisdiction of suits to which a trustee in bankruptcy was a party, without regard to diversity or amount in controversy. This jurisdiction was held to extend to every district court and was not limited to the district court in which the original petition in bankruptcy had been filed. [*Shearman* v. *Bingham*, 7 Nat. Bank Reg. 490; Fed. Cas. 12762 (1872); *Goodall* v. *Tuttle*, 10 Fed. Cas. 579 (W. D. Wis. 1872).]

In *Shearman* v. *Bingham*, *supra*, plaintiff, an assignee in bankruptcy, sued in a district court other than the one wherein the proceeding in bankruptcy was pending. The suit was dismissed for lack of jurisdiction. Mr. Justice Clifford, sitting on circuit, reversed, and held that section 1 of the Act of 1867 granted jurisdiction to every district court and not merely to the district court in which the petition had been filed.[3]

In *Goodall* v. *Tuttle*, *supra*, the assignee in bankruptcy, appointed in proceedings pending in one district, sued in another to collect a debt due to the bankrupt. A plea of the defendant to the jurisdiction was overruled because

[3] The Court said (at p. 492, *et seq.*): "No such limitation however is found in the clause of the *first section* conferring jurisdiction upon the districts courts, as courts of bankruptcy. * * * On the contrary, the same section provides that the jurisdiction conferred, that is, the jurisdiction of the several district courts, shall extend * * * to the collection of all the assets of the bankrupt; * * *." (at p. 493): "* * * Unless the assignee can collect what is due to the bankrupt, he can never perform the duty assigned to him as the representative of the bankrupt, and the *first section* of the act expressly provides, that the jurisdiction of the district courts shall extend to the collection of all the assets of the bankrupt and to all acts, matters and things to be done under and in virtue of the bankruptcy. Nothing of greater importance is required to be done under and in virtue of the bankruptcy than the collection of the assets belonging to the estate of the bankrupt. Bankrupts, as all experience shows, have debts due them in districts other than the one where the proceedings against them are instituted. * * *". (Emphasis ours.)

the court found jurisdiction in section 1 of the Act of 1867.[6]

In *Lathrop* v. *Drake* there was presented to this Court the question whether under the Bankruptcy Act of 1867 an assignee in bankruptcy "without regard to the citizenship of the parties, could maintain a suit for the recovery of assets in a circuit court of the United States in any district other than that in which the decree of bankruptcy was made." The Court noted that the jurisdiction granted to the circuit courts[7] in section 2 was concurrent with the jurisdiction granted to the district courts in section 1. If, therefore, the district courts had jurisdiction of a

[6] The court said at page 580: "The second section does not profess or attempt to confer or regulate the jurisdiction of the district courts. That relates exclusively to the Circuit Court, but it may with propriety be said to assume the existence of this jurisdiction in the district courts. That section clothes the Circuit Court with concurrent jurisdiction with the district court in certain (not all) cases arising under the Act, but not of the character of this case, so it is not necessary to define or discuss its extent or meaning. I say by that section, Congress assumed the jurisdiction of the district court in all cases and that it was conferred by section 1, for if it is not found in that it does not exist. And in that assumption there is a very clear legislative construction of the extent and meaning of section 1." (at p. 582): "* * * The act further confers the power upon the district courts to collect all the assets of the bankrupt, and to do all other acts necessary to be done in virtue of the bankruptcy. This by implication confers the authority upon the district courts to entertain jurisdiction of suits in the name of the assignee against third persons, either at law or in equity, for the collection of the debts and property of the bankrupt, and as such jurisdiction is not expressly limited to the district courts where the proceedings are pending, and as no reason exists for such limitations, the courts are not warranted in restricting its exercise to such district. I have not undertaken to define with accuracy the character or extent of the jurisdiction of the circuit courts under the second section as I do not see that that section sheds any light upon the jurisdiction of the district courts as conferred in section 1."

[7] Section 2 of the Act of 1867, provided:

"* * * said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity * * * brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property, or rights of property, of said bankrupt, transferable to or vested in such assignee."

plenary suit *in personam* brought by a trustee in a district court other than that in which the bankruptcy proceeding was pending, then by the express terms of section 2 the circuit courts would have the same jurisdiction.[8]

The Court accordingly examined the jurisdiction granted to the district courts in section 1 and found that general jurisdiction was granted in section 1 of the Act of 1867 to the district courts of all cases to which the trustee was a party.[9]

Indeed, a review of the participation by Justices Clifford, Bradley and Miller in the *Lathrop* case will establish the correctness of our interpretation of the *Lathrop* decision and the fact that it was misread by Mr. Justice Gray in the *Bardes* case. Mr. Justice Clifford was a member of the Bench when the *Lathrop* case was decided. He had already decided *Shearman* v. *Bingham*,

[8] The very form which the reasoning took should eliminate any doubt as to the source of the district courts' jurisdiction under the 1867 Act. If, as petitioners contend, that jurisdiction was to be found only in the second section, then it was unnecessary for Mr. Justice Bradley to inquire into the jurisdiction conferred in section 1,—note the terms of section 2, above quoted: "* * * (the) circuit courts shall also have concurrent jurisdiction with the district courts * * * of all suits." If this was the source of jurisdiction, why did the Court deem it necessary to refer to section 1? Clearly, because 2 did not grant jurisdiction to the district courts; it carried over to the circuit courts a jurisdiction granted in 1; section 1 was the grant of jurisdiction to the district courts; section 2 gave the circuit courts an equivalent, *concurrent* jurisdiction.

[9] The court said (at p. 516): "* * * But the enacting clauses which confer this jurisdiction [*i. e.*, on the circuit courts] make such direct reference to the jurisdiction of the District Court, that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: * * * secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction [*i. e.*, the language of section 1] of the district courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. * * * Their jurisdiction * * * extends to all matters and proceedings in bank-

It is hardly believable that three years after his decision in the *Shearman* case (placing the jurisdiction of the district courts of ordinary civil actions squarely under section 1 of the Act of 1867 and not under section 2 of that Act), he would have concurred in the decision of *Lathrop* v. *Drake* if that decision did not reach the same result. Mr. Justice Bradley wrote the opinion in the *Lathrop* case, and quoted with approval *Shearman* v. *Bingham* and expressly adverted to the fact that it had been written by Mr. Justice Clifford. It is even more inconceivable that Mr. Justice Bradley would have cited the *Shearman* case as supporting authority unless he was deciding that section 1 of the Act of 1867, and not section 2 of that Act, was the source of jurisdiction of the district courts for ordinary civil actions brought by trustees in bankruptcy.

Finally, an examination of the cases claimed in support will further show the error of the *Bardes* dictum. Mr. Justice Gray, in the course of his opinion in *Bardes*,

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ruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. * * * the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. * * * The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Shearman* v. *Bingham*, 7 Bank. Reg. 490; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy." (Bracketed insertions ours.)

cited *Smith* v. *Mason*, 14 Wall. 419 (1871) (*written by Mr. Justice Clifford*); *Marshall* v. *Knox*, 16 Wall. 551 (1872) (*written by Mr. Justice Bradley*); and *Eyster* v. *Gaff*, 91 U. S. 521 (1875) (*written by Mr. Justice Miller*), as authority for the proposition that a trustee in bankruptcy could assert title to property conveyed by the bankrupt "before the bankruptcy * * * only * * * by a plenary suit * * * under the second section of the act of 1867; * * *" (178 U. S. 524, at 532.) But Mr. Justice Gray's error will become readily apparent when these cases are examined, because they are authority only for the proposition that disputed title could be determined in plenary suits and not in summary proceedings. They are not authority for the proposition that jurisdiction was in section 2 of the Act of 1867 since those cases did not concern themselves with that issue at all.

Indeed, *Smith* v. *Mason* was decided before *Shearman* v. *Bingham* and the opinions in both cases were written by Mr. Justice Clifford. It will be recalled that Mr. Justice Clifford, in *Shearman* v. *Bingham*, squarely held that the jurisdiction of the district courts of ordinary civil actions brought by trustees in bankruptcy rested in section 1 of the Bankruptcy Act of 1867. The opinion in *Marshall* v. *Knox* was written in 1872 by Mr. Justice Bradley, three years before he wrote the opinion in *Lathrop* v. *Drake*, and it will be recalled that there he placed the jurisdiction of district courts in section 1 of the Act of 1867 and cited with approval Mr. Justice Clifford's decision in *Shearman* v. *Bingham*. Finally, *Eyster* v. *Gaff* was decided by the same Bench which ruled on *Lathrop* v. *Drake*, and the opinion in *Eyster* v. *Gaff* is reported in 91 U. S. immediately following the opinion in *Lathrop* v. *Drake*. We do not believe that Mr. Justice Miller would have concurred (in the *Lathrop* case) in placing the jurisdiction of the district courts in section 1 and then would have immediately decided the exact opposite, *sub silentio*, in *Eyster* v. *Gaff*. Indeed, bearing in mind the fact that Mr. Justice Bradley and Mr. Justice Clifford participated in all these opinions,

it is most improbable that they could have written and concurred in the opinions in *Lathrop* v. *Drake* and *Shearman* v. *Bingham*, which placed the jurisdiction of the district courts in section 1 of the Act of 1867 and then have decided the exact opposite (as the *Bardes* dictum says they did) in *Eysler* v. *Gaff*, *Smith* v. *Mason* and *Marshall* v. *Knox*.

Indisputably the *Bardes* dictum was a misreading of the opinion in *Lathrop*.[10] The proper reading of *Lathrop* v. *Drake* is that the jurisdiction of the district courts rests in section 1 of the Act of 1867 and not in section 2 of that Act. We are not alone in our interpretation of the opinion in the *Lathrop* case. Chief Justice Fuller, in *Babbitt* v. *Dutcher*, which came after *Bardes*, read the *Lathrop* case as we read it.[11]

Since section 2 of the Act of 1898 is identical with section 1 of the Act of 1867, it must follow that section 2 contains a full grant of plenary jurisdiction to all the district courts of the United States over ordinary civil actions brought by trustees in bankruptcy. When Congress passed the Bankruptcy Act of 1898, the rule in *Lathrop* v. *Drake* was the established doctrine of this Court as to the scope of jurisdiction contained in section 1 of the Act of 1867. Obviously, Congress must be deemed to have enacted section 2 of the 1898 Act, having in mind the interpretation placed on section 1 of the 1867 Act by this Court in *Lathrop* v. *Drake*,[12] and "Congress must be considered to have adopted" the interpretation placed on section 1 of the 1867 Act by this, and the lower federal courts when it re-enacted that section as section 2 of the Act of 1898.[13]

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[10] Mr. Justice Gray himself has admitted there is other error in the *Bardes* case (see *Regan* v. *Bernheimer*, 181 U. S. 189, 197).

[11] The Chief Justice also relied on *Shearman* v. *Bingham* and *Goodall* v. *Tuttle* (see 216 U. S. 102, 108, 111).

[12] *Cf. Exploration Co.* v. *U. S.*, 247 U. S. 435, 449.

[13] *Cf. U. S.* v. *Ryan*, 284 U. S. 167, 175. Petitioners' suggestion (Brief, p. 13) that the *Bardes* dictum was "accepted" by Congress *sub silentio* in the 1938 revision of the Bankruptcy Act

The argument of petitioners that section 2 of the 1898 Act is not a grant of jurisdiction of plenary suits rests on a construction of the word "proceedings" in section 2. It is urged that irrespective of the context in which the term appears in the Act it applies only to the summary steps in a bankruptcy administration. This is an unwarranted attempt to define the term "proceedings" restrictively. Analysis of various portions of the Bankruptcy Act will show that the term "proceedings" is used interchangeably with "suit" or "action." Thus, section 11e of the Bankruptcy Act authorizes trustees to "institute proceedings in behalf of the estate upon any claim." And in another connection, section 11e refers to "any proceedings, judicial or otherwise." Obviously, the term "proceedings" is used in section 11e as including a suit or action.

So also sections 60b, 67e and 70e(3) of the Act,—dealing with preferences and fraudulent conveyances,—confer jurisdiction over certain "plenary proceedings." Plainly, the term "proceedings" in these sections refers to and includes suits or actions. Indeed, in discussing the provisions of section 70e(3), the Congressional Committee used both terms "action" and "proceeding" interchangeably (H. Rep. 1409, 75th Cong., 1st Sess., p. 35), and the bill described the plenary actions thereunder as "proceedings".

As a matter of fact section 2 also provides, in subdivision 7, for the determination of "controversies" in relation to the collection of the estates of bankrupts. That "controversies" in this context includes plenary suits is clear from the fact that the same word ("controversies")

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is manifestly erroneous, especially when viewed in the light of the opinions expressed in *Babbitt* v. *Dutcher*, 216 U. S. 102 and *Schumacher* v. *Beeler*, 293 U. S. 367. *Babbitt* v. *Dutcher* clearly interprets section 2 of the 1898 Act as a grant of general jurisdiction over ordinary civil actions, and *Schumacher* v. *Beeler* approved the "view" of *Toledo Fence & Post Co.* v. *Lyons*, 290 Fed. 637, that actions by trustees in bankruptcy fell within the jurisdiction granted in Judicial Code, section 24(1). Besides, *Barides* did not "interpret" section 2; it was wholly concerned with the restrictive effects of section 23.

is so used in the Constitution[11] and in section 23—which concededly deals with plenary suits.

A consideration of section 102 also shows the fallacy of petitioners' argument. If "proceedings" in section 2 is limited entirely to the summary steps in the administration of a reorganization, then it follows that a Chapter X trustee has no power to institute a suit or action. However, section 102 incorporate Chapters I—VII of the Bankruptcy Act into reorganization proceedings. By virtue of this incorporation, it is clearly contemplated that a Chapter X trustee will institute suits or actions to set aside preferences and fraudulent transfers as provided in section 60, 67 and 70 of the Act. Indeed, section 60 (in subdivision a) and section 67 in subdivisions a(1), a(2), b, c, d(2) and d(3) directly refer to actions by a Chapter X trustee to avoid such fraudulent preferences and transfers.

Petitioners' narrow conception of the scope of the word "proceedings" has also led them into error in their views on jury trials (Brief, pp. 13, 14) and on the "exclusiveness" of bankruptcy proceedings (Brief, p. 14 *et seq.*; 26 *et seq.*). The right to a trial by jury is not, of course, foreclosed because a plenary suit may be authorized to be brought in the district courts by a section which uses the word "proceedings" in its grant of jurisdiction; it might as well be argued that all suits referred to in, *e. g.*, section 11(c), are to be tried to the court without a jury because that section, in dealing with plenary suits talks of "proceedings". Likewise, while the administration of bankrupt estates is exclusively a federal matter, that does not mean that suits growing out of such estates may not be tried in all courts, subject to the vicissitudes of local jurisdiction (cf. *Lathrop* v. *Drake*, 91 U. S. 516, 518).[11a]

[11] *Cf. Constitution, Art. 3, Sec. 2*, wherein the word "controversies" is likewise used as including plenary suits. *Muskrat* v. *U. S.*, 219 U. S. 346, 356 (1911); *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227, 239 (1937).

[11a] Petitioners now seek to escape our rebuttal as to the scope of the word "proceedings" by arguing that the grant in section 2 of the 1898 Act is limited to "bankruptcy proceedings", or, as

B. The Relation of Section 2 to Section 23.

We come now to the relation of sections 2 and 23, and the effect of the removal of section 23 from Chapter X proceedings. Section 2 is stated as a grant of jurisdiction to the district courts "except as herein otherwise provided." This Court has heretofore declared that this exception refers to section 23,[15] which it has also variously characterized as a limitation[16] on section 2, and as a prohibition[17] against the exercise of jurisdiction granted in section 2.[18]

Clearly, section 23 deals with plenary jurisdiction and was enacted as a restriction on the jurisdiction contained in the Judicial Code and in section 2 of the Bankruptcy Act.[19] Since section 23 is the exception referred to in section 2[1] and since section 23 concededly deals with plenary jurisdiction, it is clear that section 2 must likewise deal with plenary jurisdiction, because a section cannot be stated as an exception to another section unless that section deals with the same subject matter. Stated an-

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revised in 1938, to "proceedings under this Act". (Brief, pp. 8, 9, 10, *et seq.*) However, section 1 of the 1867 Act (see Appendix), like section 2 of the original 1898 Act, granted jurisdiction in "proceedings in bankruptcy". This did not deter the Court in *Lathrop* v. *Drake*, 91 U. S. 516 and *Babbitt* v. *Dutcher*, 216 U. S. 102, from viewing that section as a grant of plenary jurisdiction over ordinary civil actions.

[15] *Bryan* v. *Bernheimer*, 181 U. S. 188, 194 (1901); *First Nat. Bank* v. *Title & Trust Co.*, 198 U. S. 280, 289 (1905); *Whitney* v. *Wenman*, 198 U. S. 539, 549, 550 (1905); *Kelly* v. *Gill*, 245 U. S. 116, 119 (1917).

[16] See, *e. g.*, *Whitney* v. *Wenman*, *supra*, n. 15.

[17] *Jaquith* v. *Rowley*, 188 U. S. 620, 623 (1903); *Kelly* v. *Gill*, *supra*, n. 15.

[18] *Cf. Bardes* v. *Hawarden Bank*, 178 U. S. 524 (1899); and *Schumacher* v. *Beeler*, 293 U. S. 367, 374 (1934) where the court referred to section 23 as "in effect" a "grant" but, as noted by the court below, at a time when sections 2 and 23 were both involved in the issue for decision.

[19] An examination of the genesis of the Act of 1898 will establish the fact that section 23 was one of the compromises which the proponents of the legislation used to win support for their efforts. [*Toledo Fence & Post Co.* v. *Lyons*, 290 Fed. 637, 645; *In re Hammond*, 98 Fed. 845, 846 (D. Mass., 1899).]

other way, if section 2 did not deal with plenary jurisdiction, section 23 which does deal with plenary jurisdiction could not have been stated as an exception to 2.

Referring back to the years immediately following the enactment of the Bankruptcy Act, we find that shortly after the *Bardes* decision Congress attempted to soften the rigor of section 23 and amended sections 60(b), 67(e) and 70(e) to grant to the federal district courts jurisdiction of actions to set aside preferences and fraudulent transfers. *Babbitt* v. *Dutcher*, 216 U. S. 102, 113.[20] At the same time, Congress excepted from the scope of section 23 the actions specified in sections 60(b) and 67(e)[21] but failed to include section 70(e) as one of the excepted sections. This Court held[22] that an action under section 70(e) could not be brought in a federal court even though Congress had granted to the district court jurisdiction of such suits in section 70(e) itself. The reason was simply this: section 23 prevented the exercise of the jurisdiction expressly conferred on the district courts in section 70(e). Thereafter, Congress amended section 23 to include,[23] as one of the stated exceptions from its embrace, the actions specified in section 70(e).

This history persuades us that section 23 is not a grant of jurisdiction. If it were, then the subsequent grant in section 70(e) should have been effective. Congress can grant jurisdiction in one section (assume it to be section 23) and subsequently grant an additional jurisdiction in section 70(e). If both sections 23 and 70(e) are grants of jurisdiction, it cannot reasonably be argued that the prior grant in section 23 prevented the second grant in section 70(e) from becoming effective. Obviously, if the second grant is held to be sterilized by the terms of section

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[20] Act of Feb. 5, 1903, sections 13, 16; 32 Stat. 799, 800.

[21] Act of Feb. 5, 1903, section [illegible]; 32 Stat. 797, 798.

[22] *Wood* v. *Wilbert's Sons*, 225 U. S. 384 (1912).

[23] Act of June 25, 1910, section 7; 36 Stat. 840.

23, then we must infer that section 23 was not a grant, but a limitation on the jurisdiction elsewhere granted.[24]

With the removal of section 23, any jurisdiction to entertain plenary suits, wherever granted, whether in the Bankruptcy Act or in the Judicial Code, becomes effective. This reasoning is consistent with the ordinary rules of statutory construction, agrees with history,[25] and gives content to and renders sensible the act of Congress in removing section 23.

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[24] Note the terms in which Mr. Justice Gray answered the questions at the end of his opinion in *Bardes* v. *Hawarden Bank*: "The provisions of the second clause of section 23 * * * control and limit the jurisdiction of all courts, including the several District Courts * * * over suits brought by trustees in bankruptcy to recover or collect debts due from third parties * * *" (178 U. S. at 539). The form in which Mr. Justice Gray cast his reasoning (that section 23 was a limitation on section 2—*vide* his subsequent remarks as to this in *Bryan* v. *Bernheimer*, 181 U. S. 188) assumes an added significance when viewed against the diversity of views then prevalent in the lower federal courts. In these courts the cases fell into three patterns: (a) that section 23 was the sole grant of plenary jurisdiction; (b) that 23(b) merely applied to the circuit (not the district) courts; and (c) that section 23 was a limitation on section 2 as to all suits by a trustee. (*Cf. Hall* v. *Kincell*, 102 Fed. 391 (C. C. A. 9, 1900, for a review of these lines of authorities).) That Mr. Justice Gray did not accept the first view—the one now again proffered by petitioners—is revealed in the cast of his opinion.

[25] The jurisdiction conferred in the Bankruptcy Act, to be properly understood, must be viewed against the foil of a developing federal jurisdiction. Although the Constitution authorized Congress to vest in the federal courts jurisdiction to entertain suits "arising under the laws of the United States" it was not until 1875 that such jurisdiction was granted by Congress to the federal courts. (18 Stat. 470, Ch. 137, section 1; see, *Frankfurter & Katz, Cases on Federal Jurisdiction, p. 735.*) When the Act of 1898 was being considered, therefore, it was quite obvious that, but for a restriction imposed in the Bankruptcy Act, a federal bankruptcy trustee could sue in the federal courts under what is now section 24(1) of the Judicial Code. [*Toledo Fence & Post Co.* v. *Lyons*, 290 Fed. 637, 644 (C. C. A. 6th, 1923).] Section 23 was a deliberate legislative restriction of that source of jurisdiction. This is indicated by the courts that wrote in connection with the problem in and shortly after the passage of the 1898 Act. For example, Judge Adams said in *Matter of Sievers*, 91 Fed. 366, 372, in 1899, that the question of the jurisdiction conferred in the Bankruptcy Act on the federal courts should be

But, if we adopt petitioners' view,[26] we must conclude that the sole grant of plenary jurisdiction to the district courts is in section 23, and that the removal of section 23 has the result of denying to a Chapter X trustee even the "consent" jurisdiction which was saved to ordinary trustees by section 23. This would mean that Congress intended in Chapter X to confer a more limited jurisdiction than it had granted to ordinary trustees in the first seven chapters of the Bankruptcy Act.

If petitioners are correct, it would mean that Congress intended to restrict a Chapter X trustee to the federal jurisdiction rested on diversity of citizenship, with this additional complication: under section 23 the citizenship of the bankrupt would provide a fixed test for the trustee's citizenship. But with the removal of section 23, the trustee's own citizenship[27] (and not the bankrupt's) would be the guide in testing the existence of diversity.[28]

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considered in the light of the federal question jurisdiction conferred in the Judicial Code. He pointed out that "according to well-settled authority, to which reference need not here be made, a federal question arises in any case * * * where the plaintiff holds an office * * * created by an act of Congress. * * * In the light of the interpretation given to the [statutes conferring jurisdiction in cases arising under the laws of the United States] it seems to me that the legislative intent involved in section 23 * * * is clear. * * * In other words, section 23, when properly construed, seems to me to mean that so much of the acts * * * as confers jurisdiction * * * of a suit in favor of an officer holding title under a law of the United States, is inoperative with respect to the officer known as a trustee under the bankrupt act. * * *" Mr. Justice Day writing for this Court in *Bush* v. *Elliott*, 202 U. S. 477 (1906) likewise said (at p. 482), "The effect of [section 23] * * * is to prevent the jurisdiction of the [federal] court from attaching, because of the appointment of a trustee in bankruptcy. * * *"

[26] "It was * * * not to enlarge the jurisdiction of the federal courts that section 23 was specifically designated as one of the sections of the Bankruptcy Act not incorporated in Chapter X" (Petitioners' Brief for certiorari, p. 16; also, Main Brief, p. 25).

[27] *Cf. Dodge* v. *Tulleys*, 144 U. S. 451, 455, 456 (1892); *Coal Company* v. *Blatchford*, 78 U. S. 172, 175 (1870); *Dobie, Federal Procedure*, p. 193.

[28] The implication of this is that a reorganization court located in California and desiring to sue malefactors resident in that state could appoint a non-resident trustee (*cf.* Bankruptcy Act,

Thus this view implies that Congress not only restricted the jurisdiction as to Chapter X trustees without any readily understandable basis for such action, but at the same time left the reorganization court in the difficult position of being required to make its choice of trustees depend upon the residence of the parties.[29] Moreover, defendants to be sued in connection with matters arising out of a reorganization might live in several states, and on petitioners' theory different trustees would be required to prosecute such actions in the federal courts against the various defendants. We do not believe that this could have been desired by Congress.

A short review of the history of the development of Chapter X will prove that the intent of Congress in removing section 23 was to enlarge, and not to restrict, the Chapter X trustee's choice of forum. Chapter X was the last step in a legislative history which had its origins in a profound dissatisfaction with the workings of equity receiverships.[30] Chapter X was substantially a revision

section 156 with section 45), so that the requisites of diversity, process and venue would be satisfied and the suit could be brought in a California federal district court. On the other hand, a Virginia reorganization court confronted with malefactors resident in the New York district and desiring to appoint a trustee conversant with New York procedures would not be able to appoint a New York trustee. It would be limited as to its choice of trustee, in order to satisfy the requirements of diversity of citizenship, venue and process, if it desired to prosecute the malefactors in a New York federal district court.

[29] Section 156 permits this, for the requirements as to residence, imposed on ordinary trustees in bankruptcy by section 45, are removed. We believe that the removal was not intended to permit jockeying to fulfill diversity requirements for suits in the federal courts, but was the direct result of the nationwide scope of the corporate businesses which, it was known, would come to the Bankruptcy Court for relief. The national emphasis is indicated, in this view, by the removal of residence requirements, as to trustees.

[30] See the statement before the House Committee on the Judiciary by Commissioner (now Mr. Justice) Douglas (Hearings before Committee on the Judiciary, House of Representatives, 75th Congress, First Session, H. R. 6439 and H. R. 8046, pp. 162, *et seq.*).

of section 77B which immediately preceded it in point of time.

When Congress enacted section 77B, it left section 23 applicable thereto.[31] If petitioners' view is correct, it must follow that a broader jurisdiction was conferred by Congress on a 77B trustee than on a Chapter X trustee. It will be recalled that section 77B (as well as Chapter X) conferred on the reorganization court jurisdiction of the debtor and its property "wherever located."[32] After the enactment of 77B, the Bar divided on the interpretation and meaning of this clause. It was argued that this was a grant of nationwide jurisdiction[33] which overrode all the statutes as to venue[34] and extent of process[35] in the Judicial Code. A contrary view held that this clause was merely a statement of the extent of the reorganization court's administrative jurisdiction and had nothing to do with its *in personam* jurisdiction or the extent of its process. The clash of these views resulted in cases where trustees instituted actions in the reorganization court and named as defendants persons as to whom there was no diversity of citizenship, and persons who lived outside of the district as to whom there was diversity. It was finally held that section 23 (which Congress had continued on into section 77B) controlled, and that the clause giving the reorganization court jurisdiction of the debtor and its property "wherever located" did not broaden the *in personam* jurisdiction of the Court in

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[31] See section 77B(k).

[32] Section 77B(a).

[33] This was the holding by Rippey, *J.*, in *Thomas* v. *Winslow*, 11 Fed. Supp. 839 (W. D. N. Y., 1935).

[34] Judicial Code, sections 51, 52, 53; 28 U. S. C. A. sections 112, 113, 114.

[35] Judicial Code, sections 51, 52, 53; 28 U. S. C. A. sections 112, 113, 114; *Munter* v. *Weil Co.*, 261 U. S. 276 (1922); *cf. Robertson* v. *Labor Board*, 268 U. S. 619, 622; *see Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 683; *Matter of Standard Gas & Electric Co.*, 139 Fed. (2) 149 (C. C. A. 3rd, 1943).

plenary suits.[36] Dissatisfaction with this condition was expressed to Congress[37] when it was considering revision of section 77B, with the result that when Chapter X was enacted section 23 was eliminated therefrom. It must be concluded, therefore, that the removal of section 23 from Chapter X was designed to remedy this condition and to broaden the choice of forum of Chapter X trustees.

Indeed, further consideration of other provisions of Chapter X will make this amply clear. One of the prime differences between Chapter X and section 77B is the independent Chapter X trustee with his powers of investigation. One of the reasons why Congress created the office of the independent Chapter X trustee was to provide a method for the discovery of corporate abuse in the case of corporations in reorganization, to provide a machinery for the rectification of such abuse, and to permit the institution of actions to force restitution for any frauds or wrongs committed by the old management.[38] The Senate Committee on the Judiciary, in reporting on the bill which subsequently became Chapter X, stated[39] (in commenting on the purpose and effect of section 167, subd. 3 of the Chapter) that it "requires the trustee to report to the court any fraud, misconduct, mismanagement, or irregularities disclosed by his in-

[36] *Matter of Standard Gas & Electric Co.*, 119 Fed. (2) 658 (C. C. A. 3, 1931); *In re Prima Co.*, 98 F. (2) 952 (C. C. A. 7, 1938), cert. den., 305 U. S. 658; *cf. Thompson* v. *Terminal Shares*, 104 F. (2) 1 (C. C. A. 8, 1939), cert. den., 308 U. S. 559.

[37] See references cited in note 5 of the opinion of the Court below (R. 149).

[38] The reasons which impelled Congress to enact Chapter X are well stated by the Court below (R. 148).

[39] Report of Senate Committee on the Judiciary; Report #1916, 75th Congress, Third Session, p. 29. Elsewhere in this report the Committee refers to the fact that "In the proper administration of estates under section 77B it is necessary that the courts be provided with unbiased, impartial information as to the assets, liabilities, acts, conduct, and condition of a debtor corporation, the reasons for its insolvency, the qualifications of its management, the likelihood of reorganization, and the existence of causes of action which may add to the assets of the estate. * * * Section 77B is inadequate in all of these respects" (*id.*, p. 21). For the reasons thus set forth, section 167 was written into Chapter X.

vestigation, and insures prosecution of all causes of action: * * *"

Obviously, Congress intended that Chapter X should be something more than a mere administration of a corporation's estate; that it should be something more than the mere machinery for the formulation of a plan. Congress intended that Chapter X should provide a machinery for the investigation and discovery of management abuse and the institution of suits[40] to rectify those abuses.[41] In that view, the removal of section 23 from reorganizations under Chapter X indicates a direct Congressional purpose to enlarge the trustee's choice of forum[42] so as to effectuate the federal purposes of Chap-

[40] Reference to the provisions of Chapter X will disclose the error in petitioners' logic. The Chapter expressly confers upon a Chapter X trustee all the title, powers and duties of a trustee appointed under the first seven chapters of the Bankruptcy Act (sections 186, 187). One of those duties—and of course, a very important one—is the institution of suits for the recovery of assets. Moreover, sections 60, 67 and 70 specifically contemplate actions to set aside preferences and fraudulent transfers by Chapter X trustees. In addition, section 216 (subdivision 13) imposes on a Chapter X trustee the duty of enforcing "claims belonging to the debtor," as a part of the consummation of a reorganization. This assumes that a Chapter X trustee will institute suit. It is hardly believable that Congress would have, in sections 60, 67, 70 and 216 (subd. 13) referred to actions by Chapter X trustees to set aside preferences, fraudulent transfers and to enforce claims belonging to the estate if it considered that Chapter X were to be limited entirely to mere administration of a reorganization—*i. e.*, the formulation of a plan.

[41] We do not believe that petitioners really dispute the fact that a Chapter X trustee is authorized to bring an action for the rectification of corporate frauds; for they have at various times suggested that this action could be brought in the state courts. We pass for the moment the obvious logical dilemma in petitioners' reasoning which this creates. If Chapter X is merely an administrative proceeding, logically a Chapter X trustee should not be granted power to institute any kind of a suit at all—anywhere. The concession by petitioners that a Chapter X trustee can bring a suit as here involved in a state court should be considered as throwing some light on the fundamental validity of their argument.

[42] This is Professor Moore's view. He says that the "* * * elimination [of section 23] from reorganization proceedings makes it clear that plenary suits by trustee or receiver are maintainable

ter X and to provide the federal district courts as additional *fora*, since, "where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. *Holmberg* v. *Armbrecht*, 327 U. S. 392." (*Angel* v. *Bullington*, —— U. S. ——, No. 31 this Term, Feb. 17, 1947, Slip Sheet, p. 8. Cf. Respondents' brief as *amici* in *Holmberg* v. *Armbrecht*, 327 U. S. 392.)

II.

Bankruptcy Act, Section 115, as a Source of Jurisdiction.

Section 2 is not the only source in the Bankruptcy Act of jurisdiction in this case. We believe that jurisdiction may also be found in section 115 which grants to "the court * * * all the powers * * * which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor. * * *"

The question is not one of power—for Congress had the same power[43] as to all the district courts—but as to the scope of the jurisdiction conferred in section 115. Petitioners dispute only the scope of the jurisdiction conferred in this section. Their argument, simply stated, is that by the terms of the Act the grant is to a desig-

in the federal courts as ancillary to bankruptcy reorganization whether or not separate grounds for federal jurisdiction exist." (*Moore's Bankruptcy Manual* (1939), p. 494).

[43] *Schumacher* v. *Beeler*, 293 U. S. 367, 371 (1934); *Kelley* v. *Gill*, 245 U. S. 116, [illegible] (1917) ("* * * Whether the right to choose the court and the place in which the litigation shall proceed should be conferred upon the trustee or upon the defendant, is a legislative question with which Congress has dealt in the Bankruptcy Act * * *"); *Taubel, etc., Co.* v. *Fox*, 264 U. S. 426, 430 (1924) ("* * * Congress has, of course, power to confer upon the bankruptcy court jurisdiction to adjudicate the rights of trustees to property adversely claimed. * * * Hence, even if the property is not within the possession of the bankruptcy court, Congress can confer upon it, as upon any other lower federal court, jurisdiction of the controversy, by conferring jurisdiction over the person in whose possession the property is * * *").

nated, single court: "the court in which the petition is filed"—a literality which recalls the disputes which we thought were laid at rest by *Lathrop* v. *Drake* and *Rabbitt* v. *Dutcher*.

Our argument is that the words "the court" are not to be viewed in a restrictive sense as designating only the court in which the petition for reorganization was filed. We believe that the words "the court" are to be read distributively and to refer to the Court of Bankruptcy which means every district court so far as it may have anything to do with the reorganization proceeding or with cases arising therefrom. This interpretation would agree with the intent of Congress to assimilate the equity receivership powers and jurisdiction into the Bankruptcy Court.

Admittedly, Congress desired to adopt only the good features of the receivership practice. The objections which had been leveled at the equity receiverships were in part concerned with the problems of ancillarity. Through the device of the Bankruptcy Court—all the district courts of the United States—Congress conferred a jurisdiction which was intended to destroy ancillarity with all its attendant evils. When Congress in Chapter X wrote "the court" it clearly meant the Bankruptcy Court, and it did not intend to have its language read narrowly, for that would merely re-create the evils which the Chapter had been designed to correct.

It will be recalled that section 1 of the Bankruptcy Act of 1867 granted jurisdiction to the various district courts "in their respective districts." And the argument was made under that statute that the words "in their respective districts" limited the jurisdiction of the district courts in bankruptcy matters so that only the district court in which the petition was filed, sitting as a Court of Bankruptcy, had any jurisdiction over that matter. That argument was answered by this Court in *Lathrop* v. *Drake* when it said that the words "in their respective districts" did not restrict the grant of jurisdiction to the court in which the proceeding pended, but conferred

jurisdiction on all district courts with respect to bankruptcy matters no matter where the estate was administered. Later the argument was made, under the 1898 Act, that a district court in New York could not issue any process in aid of a bankruptcy proceeding pending in another district. This Court, in *Babbitt* v. *Dutcher*, held that every district court had the necessary jurisdiction to aid in the effectuation of bankruptcy administration no matter where the original proceeding was pending. Subsequently Congress incorporated the rule of the *Babbitt* case in a subdivision of section 2.[44] Based on the reasoning of *Lathrop* v. *Drake* and *Babbitt* v. *Dutcher*, we believe that the grant of equity jurisdiction in section 115 is a grant to the Bankruptcy Court, which means every district court and is an analogue of the grant of section 1 in the Act of 1867 and of the grant of section 2 in the Act of 1898.

Reference to the old equity receivership cases (and it was the equity jurisdiction which was borrowed in 115) shows that a United States district court which appointed a receiver of the property of the corporation could, independently of diversity of citizenship of the parties, exercise jurisdiction of plenary suits arising out of the receivership proceeding to collect the assets of the estate. (*White* v. *Ewing*, 159 U. S. 36.) It must follow,—(if *Babbitt* v. *Dutcher* and *Lathrop* v. *Drake* correctly formulate a rule of distribution of jurisdiction not peculiar to the sections of the Act involved in those cases)—that the grant of equity jurisdiction in section 115 is a grant to every district court. This is the only sensible[45] interpretation of the grant in section 115. Otherwise, since the statutes as to venue and extent of process have not been interfered with, the jurisdiction granted in section 115 would be available only in the special case where the de-

[44] Now section 2(a) 20 of the Act.

[45] *Cf. U. S.* v. *Ryan*, 284 U. S. 164, 175 ("* * * all laws are to be given a sensible construction. A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose.")

fendants to be served resided within the territorial limits of the home court's jurisdiction.

In view of the widespread nature of corporate business—and Congress in Chapter X was dealing with corporations having a far-flung national business scope—it would indeed be peculiar for Congress to grant equity powers only to the home court. It is much more reasonable to believe that Congress undertook, in section 115, to extend the jurisdiction so as to render the Act effective for the purposes for which it was intended. This would require that section 115 be construed as a grant to every district court insofar as it was necessary to entertain suits in aid of the original reorganization because the defendants involved frequently reside beyond the home court's territorial jurisdiction.[46]

The construction which we suggest is neither novel nor unique. [Cf. *Collett* v. *Adams*, 249 U. S. 545 (1919); *Martex Realization Corp.* v. *Wolfson*, 143 Fed. (2) 360 (C. C. A. 2nd 1944).] Insofar as that construction re-

[46] The selection of the Virginia District Court as the one in which the petition for reorganization was to be filed was determined by the old management of the Debtor—the one with whom we have been litigating this controversy. They were permitted to choose the Virginia Court because the Debtor was incorporated in the State of Virginia. But the greater part of its work and major transactions were consummated outside of Virginia, and most of its business transactions were done in the City of New York, the financial center of the nation, because the Debtor was the top holding company of a pyramided series of holding companies which engaged in the business of financing huge ventures, the flotation of large security issues, and the organization of substantial corporations. Necessarily, most or all of the individuals connected with the old management of the Debtor would be residents of the New York district. Realistically viewed, the effectuation of the petitioners' contention would result in a holding that, at least with respect to this Debtor, the equity jurisdiction granted in Chapter X was abortive. For, as this Court well knows, it would have been futile to have filed the complaint in the Reorganization Court because its process could not have issued out of its district to reach the persons of these petitioners. Their argument on this score, therefore, would, if accepted, result in the grant of a sterile jurisdiction—a jurisdiction simultaneously nullified by the venue and process provisions of the Judicial Code.

quires the distribution of jurisdiction to all the district courts of the United States it may be supported by the express grant of power as to ancillary matters in section 2(20) of the Bankruptcy Act.

For example, in *Collett* v. *Adams*, 249 U. S. 545 (1919) an action was brought by a trustee in bankruptcy for an accounting and to set aside a voidable transfer of property located outside the territorial jurisdiction of the Court in which the petition was filed. In reversing a decree dismissing the suit for want of jurisdiction this Court said at page 549:

> "Sections 1(8) and 2 define 'courts of bankruptcy' as including the several District Courts of the United States, and § 2(20) invests the courts of bankruptcy with power to '*exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending* in any other court of bankruptcy.'
>
> "The amendments are couched in plain words and effect a material change in the jurisdiction of suits by trustees to avoid preferential transfers and recover the property or its value under § 60b. The exception engrafted on § 23b takes such suits out of the restrictive provisions of that section; the sentence added to § 60b makes them cognizable in the court of bankruptcy, as well as in such state courts as could have entertained them if bankruptcy had not intervened, and the new clause in § 2 dispels any doubt that otherwise might exist respecting the power of a court of bankruptcy other that the one in which the bankruptcy proceeding is pending to entertain such a suit where the property sought to be recovered is within its territorial limits."

The argument to the contrary depends upon a literal interpretation of the words "the court" which appear in

the various sections of Chapter X.[47] Section 111 grants exclusive jurisdiction of the debtor and its property, wherever located, to "the court in which a petition is filed." Sections 112 and 114 continue to refer to "the court", and section 115 then provides that "the court" shall have the equity powers "which a United States court would have if it had appointed a receiver in equity of the property of the debtor * * *"

The argument based on the words "the court" runs to the effect that by plain terms Congress has conferred this equity jurisdiction only on one designated court—which, for convenience, has been called the "home" or "domiciliary" court.

It is our view that such literality was not intended by Congress, which clearly meant to broaden, not to restrict, the choice of forum available to Chapter X trustees and to confer the equity powers in section 115 on any district court in which suit might be instituted.[48] Obvi-

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[47] Thus petitioners, in their brief in support of certiorari have written (at p. 15): "The specific grant of jurisdiction applicable to Chapter X matters is found in section 114 * * * which restricts jurisdiction to the court where the petition is filed, or to the court to which the petition is transferred. Section 118. The definitions in the act of the court dispel all doubt on this point: Sections 1(9), 102." (See, also, their main Brief, p. 28.)

[48] Petitioners have insisted that the definition in section 1(9) requires the interpretation for which they contend. That definition provides that "court" shall be taken to mean "the judge or referee of the court of bankruptcy in which the proceedings are pending." But if this definition were substituted for "court" in section 115 it would result in the grant of jurisdiction to the judge when Congress obviously meant court, and would stultify the Congressional purpose. The argument is made possible only because of a change in wording in the definition of "court" as it appeared in the original act. In the Bankruptcy Act of 1898, the word "court" was defined as follows:

"Section 1(7) 'court' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee;"

The present definition of "court" appears in section 1(9) of the Act. However, it is clear from the House Committee Report that no change *in substance* was made, since the Report states, as to this, that:

"* * * The proposed amendment is intended to make clear that

ously, therefore, if the Congressional purpose is to be achieved, section 115 should be given a sensible construction to effectuate that purpose. Such a construction requires that the words "the court" be construed to mean the Court of Bankruptcy,[19] which includes all the district courts of the United States, and not merely the court in which the petition is filed, or in which the proceeding is pending.

That this result is the one which Congress intended and expected, is made plain when we examine the provisions of section 21(a). As that statute appeared under the 1898 Act, it provided that "a court of bankruptcy" may require a person to appear "in court" for examination. When the question was presented whether the power to issue orders for examination was limited to "the court" in which the petition was filed, this court answered that such a limitation could not be read into

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generally and not merely in special instances the functions of the bankruptcy court may be exercised by the referee" (H. R. Report No. 1409, 75th Congress, 1st Session (1937), at p. 5).

The same Report further states that this change was not one of substance from the original definition because,

"* * * the bill is not * * * a revision. It *does not change the existing system in any of its fundamentals*" (id., at p. 4; emphasis ours).

Since this change of wording was inadvertent, and not intended to produce the result for which petitioners contend, their argument should be tested against the old definition. When so tested we find that what petitioners are urging is the very argument this Court refused to accept in *Babbitt* v. *Dutcher*—that the jurisdiction granted in the act be confined to "the court" in which the petition had been filed.

[19] It will be noted that the petitioners' argument as to the restricted meaning which they claim must be given to the words "the court" loses sight of the general scheme of the Bankruptcy Act. Petitioners insist that for the content of "the court" reference must be had only to the definition section appearing in section 1(9) of the Act. This, it will be recalled, defines "court" as follows: "(9) 'court' shall mean the judge or referee of the court of bankruptcy in which the proceedings are pending". But this argument does not adequately explain what courts are courts of bankruptcy, since Chapter X only mentions "the court", and section 1(9) merely defines "the court" as the judge or referee of the court of bankruptcy in which the proceedings are pending.

the statute; and that every district court, and not merely the court in which the proceeding was pending, could issue orders for examination.[30]

In the 1938 revision, section 21(a) was recast so that it now reads "*the court* may * * * require any designated persons * * * to appear before *the court* * * * to be examined. * * *" If this statute is given a literal reading then it must follow that no court, other than the court in which the proceeding is pending, can issue examination orders. But Congress never intended such a result and clearly meant that the words "the court" in section 21(a) should be read as meaning "a court of bankruptcy". Since Congress has clearly stated that in making the 1938 revision it was not changing "the existing system in any of its fundamentals,"[31] it follows (because the same words "the court" likewise appear in Chapter X) that the same construction must be given to those words. To restate our argument: Congress has clearly indicated that the words "the court" in section 21(a) are identical with the words "a court of bankruptcy." Since the same words appear in Chapter X, they must be given the same interpretation.

If we refer further to the provisions of Chapter X, this will be made even more evident. This section 148 provides that under certain circumstances a proceeding may

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To find what courts are vested with bankruptcy jurisdiction one must turn to section 2a which vests bankruptcy jurisdiction in the United States district courts as follows:

"The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and hereby invested within their territorial limits * * * with such jurisdiction (etc.). * * *"

The courts which were "hereinbefore defined as courts of bankruptcy" are the district courts of the United States (section 1(10)). Thus the only general statute which creates courts of bankruptcy—section 2a—confers all bankruptcy powers generally on all the United States district courts when passing on bankruptcy matters, no matter where the proceeding may be pending. (*Lathrop* v. *Drake*, 91 U. S. 516; *Babbitt* v. *Dutcher*, 216 U. S. 102.)

[30] *In re Elkus*, 216 U. S. 115 (1910).

[31] See note 6, *supra*.

be transferred to "a court of bankruptcy in any other district." Such "court of bankruptcy" (to which the proceeding was transferred) must then be deemed to have the equity powers granted in section 115, for otherwise we would have the absurd result that such powers are limited to "the court in which the petition is filed" even after the transfer has removed the proceeding from its jurisdiction. And since a "court of bankruptcy" is defined by section 1(10) to include all the district courts it must follow that after the transfer the powers conferred by section 115 on the Court in which the petition is filed are available to every district court. To restate the argument, section 118 defines the transferee court as a "court of bankruptcy" which—as we have shown—has the equity powers granted in section 118. Since a "court of bankruptcy" is defined in section 1(10) as including all the district courts, the equity jurisdiction contained in section 115 must then be available to every district court.

Thus we reach this result: after a proceeding has been transferred, the equity jurisdiction in section 115 may be exercised by any district court, but, before transfer, only by "the court" in which the petition is filed. Such an absurdity could not have been intended and is avoided if the words "the court" are, at the outset, held to mean "court of bankruptcy."

III.

The Judicial Code as a Source of Jurisdiction.

Thus far we have been discussing the jurisdiction which can be found in the Bankruptcy Act proper. That, however, is not the only source of jurisdiction of this suit in the district courts. Under section 24 of the Judicial Code jurisdiction is conferred on the district courts of suits by officers of the United States, suits arising under the laws of the United States, and of "matters and proceedings" in bankruptcy. If, therefore, plaintiffs are officers of the United States, or if the suit is one arising under the laws of the United States, or if it is

a matter or proceeding in bankruptcy, then the district court had jurisdiction. As we have already shown, the only statute which prevented the exercise of this jurisdiction was section 23 of the Bankruptcy Act. When that section was removed, as to Chapter X trustees (by section 102 of the Bankruptcy Act), the jurisdiction theretofore conferred in the Judicial Code became available to Chapter X trustees. We shall now discuss these separate grants of jurisdiction.

A.

Respondents Are Officers of the United States.

Section 24(1) of the Judicial Code grants jurisdiction to the district courts "of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue. * * *" This Court has held that a receiver of a national bank, appointed by the Comptroller of the Currency, is an officer within the meaning of Judicial Code, section 24(1) who can sue in the district courts without regard to diversity or amount in controversy.[32] We believe that respondents, being trustees in bankruptcy, bear the same relation to their estate that a receiver of a national bank bears to his estate.

No distinction exists between receivers of national banks and trustees in bankruptcy with respect to their capacity as officers of the United States. Receivers of national banks are appointed by the Comptroller of the Currency; trustees in bankruptcy are appointed by the federal courts. Both the Comptroller and the federal courts have authority granted them by Congress under the Constitution to appoint such officers. Both are authorized by law to sue; both perform functions which are essentially similar with respect to the estates which they represent. The reasoning which holds that a receiver of a national bank is an officer of the United States within the meaning of section 24(1) of the Judicial Code applies, therefore, to

[32] *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 225 (1936).

a trustee in bankruptcy appointed pursuant to the provisions of Chapter X of the Bankruptcy Act.

The Bankruptcy Act defines "officer" as including a "trustee" [section 1(22)] and contains a fifth chapter entitled "OFFICERS, THEIR DUTIES AND COMPENSATION", in which chapter "the offices of referee and trustee are hereby created" (Bankruptcy Act, section 33). In the same chapter, the Act provides for the manner of appointment and qualifications of trustees (sections 44, 45), their duties (section 47), their compensation (section 48), and requires that a trustee before entering upon the performance of his official duties "shall qualify by entering into bond to the United States" in the manner therein provided (section 50). Trustees appointed pursuant to the provisions of Chapter X of the Bankruptcy Act are subject to similar provisions (sections 156, 186, 187).

Thus, the plaintiffs are by definition officers who are appointed by a "court of law" (the Bankruptcy Court) in which Congress has vested the power to make "the appointment of such * * * officers" (*Constitution, Art. 2, section 2, cl. 2*); trustees in bankruptcy, therefore, as such officers, would be entitled to maintain their suits in the district courts of the United States unless otherwise restricted or limited.[53]

Prior to the passage of Chapter X of the Bankruptcy Act, there was a restriction or limitation on the authority of a trustee in bankrupt[illegible] to bring his suit as officer of

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[53] *Toledo Fence & Post Co.* v. *Lyons*, 290 Fed. 637, 642, 644, 645 (C. C. A. 6th, 1923); *Matter of Sievers*, 91 Fed. 366, 372 (E. D. Mo., 1899); *Bush* v. *Elliott*, 202 U. S. 477, 482, 483 (1906); *Spencer* v. *Duplan Silk Co.*, 191 U. S. 526, 531 (1903); is not to the contrary since it is section 23 of the Bankruptcy Act which, in 1903, required the statement that merely because plaintiff was a trustee in bankruptcy he did not have access to the federal courts. *Cf. Burbank* v. *Bigelow*, 92 U. S. 179, 181, 182 (1875); *Woolridge* v. *McKenna*, 8 Fed. 650, 676 (C. C. W. D. Tenn., 1881); "* * * These cases [referring to the *Spencer* case] all say this as a result of their consideration and application of the limitations of section 23, and they have no bearing upon the question we are considering, viz., whether there would be such jurisdiction if these limitations were absent. * * *". Denison, *C. J.*, in *Toledo Fence & Post Co.* v. *Lyons*, 290 Fed. 637, 644.

the United States in any district court. Section 23 of the Bankruptcy Act limited the authority of the trustee in bankruptcy as an officer of the United States by requiring that, with certain specific exceptions not here applicable, suits by such trustee must be brought in the district where the bankrupt could have sued unless the defendant consented. So long as section 23 of the Bankruptcy Act was in effect and applicable, the trustee in bankruptcy could not, on his authority as an officer of the United States, bring his suit in the district courts of the United States, except as so limited by section 23.

As indicated in the absence of the limiting provisions of section 23 of the Bankruptcy Act, the trustee in bankruptcy can sue in any district court by virtue of his authority as an officer of the United States. This limiting provision, *i. e.*, section 23, was removed from Chapter X proceedings by section 102 of the Bankruptcy Act, which specifically made section 23 inapplicable to Chapter X proceedings. As a necessary result the authority of a trustee in bankruptcy to sue in any district court of the United States, as an officer of the United States, was reinstated immediately upon the elimination of the limiting provision.

The result is that a trustee appointed under Chapter X of the Bankruptcy Act is an officer of the United States authorized by law to sue and may sue in the United States district courts without regard to diversity, or amount in controversy, and without the limitations imposed by section 23 of the Bankruptcy Act.

B.

Specific Jurisdiction Is Conferred in Judicial Code Section 24(19).

Section 24(19) of the Judicial Code is entitled "Suits and Proceedings in Bankruptcy" and confers original jurisdiction on the district courts of "all matters and proceedings in bankruptcy." In the Senate Report which accompanied the revision of the laws when section 24(19)

of the Judicial Code first took its present form, there appears the following commentary:[34]

> "This paragraph is merely declaratory of jurisdiction in the district courts of all matters and proceedings in bankruptcy, conferred by sections 2 and 23 of the Act of July 1, 1898 (2 Supp. 843) and is stated substantially in the language of paragraph 20 of §563."

Indisputably, Congress was here dealing with jurisdiction of ordinary civil suits, because it referred to section 23 of the Bankruptcy Act which we know deals with plenary jurisdiction and it entitled subdivision 19 as including "suits and proceedings in bankruptcy". Moreover, "proceedings" has been used by Congress as including ordinary civil actions.[35] Besides, the grant of plenary jurisdiction over civil actions in section 1 of the 1867 Act was with respect to "all matters and proceedings in bankruptcy"—the exact words used in this sub-section. It would appear therefore that section 24(19) of the Judicial Code grants to the district courts jurisdiction of plenary suits brought by a bankruptcy trustee.

This jurisdiction was limited by section 23 of the Bankruptcy Act. With the removal of that restriction (by section 102) the grant of jurisdiction in section 24(19) of the Judicial Code remains available to Chapter X trustees and the district court could have taken jurisdiction of the action under this section.

C.

The Action Is One Arising Under the Laws of the United States.

The remaining ground for jurisdiction urged in this case is that the suit is one which arises under the laws of the United States within the meaning of Judicial Code, section 24(1). The Constitution, in Article 3, Section 2,

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[34] Senate Report #388, Part 1, 61st Congress, 2nd Session (1909-1910); Vol. 4 (Report on S 7031, "Revision of the Laws"). The quotation in the text is from page 16 of the Report.

[35] See discussion, *supra*, pp. 14 *et seq.*

provides that the judicial power of the United States shall extend to all cases "arising under * * * the Laws of the United States." Section 24(1) of the Judicial Code grants to the district courts jurisdiction "of all suits of a civil nature at common law or in equity * * * where the matter in controversy * * * arises under the * * * laws of the United States * * *", subject only to jurisdictional amount. It will, therefore, be seen from the language of section 24(1) that Congress has conferred all the jurisdiction within its power to confer (subject only to jurisdictional amount) on the district courts. The pertinent language of section 24(1) is identical with the Constitutional grant.

The only question here involved is, therefore, whether a suit by a trustee in bankruptcy is one arising under the laws of the United States.[36] If such a suit is one arising under the laws of the United States, then Congress has granted jurisdiction to the district courts in Judicial Code section 24(1) subject only to jurisdictional amount.

A lucid exposition of the reasoning which demonstrates that an action by a trustee in bankruptcy is one which arises under the laws of the United States will be found in *Toledo Fence & Post Co. v. Lucas*, 290 Fed. 637 (C. C. A. 6th, 1923). That case involved the "consent" jurisdiction of the district courts growing out of section 23(b) of the Bankruptcy Act, which, it was contended, could not be conferred by Congress. In refuting this argument, the Court reasoned that an action by a trustee in bankruptcy would be one "arising under the laws

[36] We have already demonstrated that a trustee in bankruptcy is an officer of the United States, having the same status as a receiver of a National Bank. This Court has said that for jurisdictional purposes such a receiver "is an officer of the United States, and an action against him is one arising under the laws of the United States * * *." *(Auten v. United States National Bank*, 174 U. S. 125, 141 (1899). "* * * He might have sued in a federal court * * * the receiver is an officer of the United States and, as such, entitled to sue for assessments in a federal court, irrespective of the citizenship of the parties or the amount in controversy. * * *" *(Putahl v. Estate of Parks*, 299 U. S. 217, 225 (1936).

of the United States, since the trustee would sue by virtue of a title created by the bankruptcy law. * * *. The suit is one step in the collection of assets in the execution of the bankruptcy act."

In *Schumacher* v. *Beeler*, this Court, in discussing the reasoning of *Toledo Fence & Post Co.* v. *Lyons*, said:

"* * * It proceeds upon the ground that the Congress had power to permit suits by trustees in bankruptcy in the federal courts against adverse claimants, regardless of diversity of citizenship. * * * We think that [this] * * * view is the correct one. * * *" (at p. 371).

The "view" of the *Toledo* case, which this Court was approving as "the correct one", was described by the same Circuit Court of Appeals which decided the *Toledo* case as follows: "* * * It was in that case [*i. e.*, the *Toledo* case] the view * * * of the court that except for * * * section [23] the federal court would have jurisdiction of all suits by a trustee to recover debts due the bankrupt, as being suits arising under the laws of the United States * * *" [*Beeler* v. *Schumacher*, 71 F. (2d) 831, 833 (C. C. A. 6th, 1934)][37].

It is clear, therefore, from the decisions of this Court that Congress has the power to grant to the district courts jurisdiction of such suits by trustees in bankruptcy on whatever terms Congress saw fit to impose.[38] If Congress has such power, it can only be derived from the Constitution, which means that it must be an action arising under the laws of the United States. This jurisdiction was in fact granted to the district court by Judicial Code section 24(1).

Petitioners have sought to avoid the jurisdiction thus established by relying on the test set forth in *Gully* v. *First National Bank*, 299 U. S. 109. In the *Gully* case

[37] *Cf. Williams* v. *Heard*, 140 U. S. 529, 535 (1891); *Dushane* v. *Beall*, 161 U. S. 513, 516 (1896); *Rector* v. *City Deposit Bank*, 200 U. S. 405, 411, 412 (1906).

[38] See authority cited in note 43, *supra*.

this Court held that an action to recover a debt, which resulted from a tax levied by the State of Mississippi on national banks, did not "arise under the laws of the United States" within the meaning of Judicial Code section 28 which permits removal[59] to the federal courts of actions "arising under the laws of the United States." Indeed, this Court said that any question of federal law which might have been involved in the *Gully* case was merely "lurking in the background" and was too remote[60] [*cf. Phillips* v. *United States*, 312 U. S. 246, 253 (1941)] to bring the case within the meaning of the phrase "cases arising under the laws of the United States."

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[59] *See Colorado Bank* v. *Bedford*, 310 U. S. 41, 47 (1940).

[60] Obviously, an action by a trustee in bankruptcy does not suffer from such remoteness. *Cf. Hull* v. *Burr*, 234 U. S. 712, 720, 721 (1914). The inapplicability of the *Gully* case to actions by trustees in bankruptcy is demonstrated in *Toledo Fence & Post Co.* v. *Lyons*, 290 Fed. 637, at 643:

"We do not overlook that it was said by Chief Justice Fuller in *Western Union Co.* v. *Ann Arbor Co.*, 178 U. S. 239, 243, 20 Sup. Ct. 867, 869, (44 L. Ed. 1052), that——

'When a suit does not really and substantially involve a dispute or controvery as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the constitution or laws.'

"This has been often quoted or paraphrased, and it sometimes seems to have been thought to call for an actual disagreement between the parties as to the construction or effect of the federal law. Perhaps its broad language suggests that thought, but it cannot be so intended. The jurisdiction of the court cannot be ousted because the defendant concedes the original federal right and pleads only a discharge or other wholly nonfederal defense. A suit by a federal officer, or a national bank receiver, or a corporation of federal creation, may in truth involve no dispute whatever about any question of federal aspect; but the jurisdiction has never been for that reason doubted. The quoted phrase must be intended to apply not merely to cases where a dispute about the meaning or effect of the federal law has actually materialized, but also to cases where such dispute inherently lurks and must be tacitly passed over or decided before coming to the real quarrel. It has found chief application, early and late (*Shoshone* v. *Rutter*, 177 U. S. 505, 507, 20 Sup. Ct. 726, 44 L. Ed. 864; *Shulthis* v. *McDougal*, 225 U. S. 561, 569, 32 Sup. Ct. 704, 56 L. Ed. 1205), in cases where land

Moreover, the *Gully* case has set forth many tests[61] and it is not clear on which one petitioners rely, since they have quoted all the "tests". However, that is not important, for it is our view that the rule in the *Gully* case has no application here. Obviously, if Congress could have specifically granted jurisdiction to the district courts of actions by trustees in bankruptcy, it must be, as we have shown, because such suits do arise under the laws of the United States within the meaning of the Constitution. A suit brought by a trustee in bankruptcy under such a specific grant of jurisdiction could not be subject to any of the "tests" of the *Gully* case, because that would imply that the basis for the original grant of jurisdiction to the district courts was unconstitutional. Since this Court has at various times stated the exact opposite, it must follow that the *Gully* case does not apply to an action by a trustee in bankruptcy; otherwise, we have the result that on the one hand this Court has said that a suit by a trustee in bankruptcy does arise under the laws of the United States since Congress has the power to

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titles originated under federal law; and it is there only another application of the rule of *Gableman* v. *Peoria, supra*, that a remote connection with federal law is not sufficient. The Supreme Court speaking by the same justice, in *Bankers' Co.* v. *Texas Pacific Railway, supra*, did not intend to overrule the principle which it had applied in *Shulthis* v. *McDougal, supra*; it did not perceive any inconsistency." Illustration, that an active dispute as to construction is not necessary is furnished by recent statutes, of which the Safety Appliance Act (Comp. St. §§ 8605-8623) and the Employers' Liability Act (Comp. St. §§ 8657-8665) are instances. The right of action depends in some measure on these statutes, but the parties may all agree as to the construction and effect of the law and may litigate only the amount of damages or the validity of a release; nevertheless, there is federal court jurisdiction."

[61] For example, one of these tests is that a construction of a federal law is involved. This must necessarily and logically imply that once the federal statute has been construed, the very next case involving the same statute would not present a question for interpretation so as to justify federal jurisdiction. *Cf. Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285, 288, 292, 294 (1910). But this would deny to Congress its constitutional power to grant jurisdiction to the district courts of, *e. g.*, actions by trustees in bankruptcy.

grant to the district courts jurisdiction of actions by trustees in bankruptcy, while on the other hand the *Gully* case purports to lay down tests which, if applicable, would defeat that jurisdiction.

We repeat, therefore, that the *Gully* case was not designed to apply to actions by trustees in bankruptcy. This is precisely what this Court has plainly indicated in *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 225 (1936). That was an action by a receiver of a national bank to recover a stock assessment—a debt created by federal statute. In the vast majority of these cases the federal statute is never construed and exists simply to establish a basis for liability. The question for decision is entirely one of fact: Was the defendant a stockholder, or was he not? But if the test of the *Gully* case were applied such suits could never be brought in the federal courts. Nevertheless, this Court has plainly held that they may be brought in the district courts because the receiver of a national bank is an officer of the United States—and an action by an officer of the United States is one which arises under the laws of the United States. (The exact analogue of an action by a trustee.)

What we have, therefore, are situations where Congress could validly have conferred (and indeed did confer) jurisdiction on the federal courts of suits which it might be claimed do not meet the *Gully* test. What does this mean? Clearly, that the *Gully* test cannot and was not meant to be applied to actions by trustees in bankruptcy, to actions by officers of the United States, or to any other situation wherein Congress has specifically conferred jurisdiction on the district courts because such actions are indisputably actions "arising under the laws of the United States"; otherwise it would have been unconstitutional for Congress to have made the grant of jurisdiction in the first place. Therein lies the error in petitioners' reasoning. The *Gully* rule was meant to apply to cases (like *Shoshone Mining Co.* v. *Rutter*, 177 U. S. 505, 507) falling outside of the area of jurisdiction affecting suits by

trustees in bankruptcy, officers of the United States, or the other fields where Congress is constitutionally empowered to confer jurisdiction on the district courts of the United States.

CONCLUSION.

The Order and Judgment Below Should Be Affirmed.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

Section 1 of the Bankruptcy Act of 1867:

"That the several district courts of the United States be, and they hereby are constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. * * *

"And the jurisdiction hereby conferred shall extend. * * *

"To the collection of all the assets of the bankrupt * * * and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

The BANKRUPTCY ACT OF 1898, as amended, provides:

Sec. 2a(7). "Creation of Courts of Bankruptcy and Their Jurisdiction.—a. The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to——

* * *

"(7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided, * * *".

SEC. 23. "Jurisdiction of United States and State Courts. a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

SEC. 101. "The provisions of this chapter shall apply exclusively to proceedings under this chapter."

SEC. 102. "The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23, subdivisions b and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a

petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered."

Sec. 111. "Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located."

Sec. 114. "Upon the approval of a petition, the jurisdiction, powers, and duties of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication."

Sec. 115. "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

The JUDICIAL CODE, as amended, provides:

Section 24(1) (in part):

"The district courts shall have original jurisdiction as follows:

"First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, * * * or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, * * *"

Section 24(19):

"The district courts shall have original jurisdiction as follows:

"Nineteenth. Suits and proceedings in bankruptcy. Of all matters and proceedings in bankruptcy."

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APR 10 1947

No. 850

In the Supreme Court of the United States

OCTOBER TERM, 1946

HARRISON WILLIAMS, ET AL., PETITIONERS

v.

CARL J. AUSTRIAN AND ROBERT G. BUTCHER, AS TRUSTEES OF CENTRAL STATES ELECTRIC CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 850

HARRISON WILLIAMS, ET AL., PETITIONERS

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

The Securities and Exchange Commission submits this brief *amicus curiae* because of the importance of the question presented in the administration of Chapter X. Under Section 208 of Chapter X the Commission is a party to the pending reorganization proceeding for Central States Electric Corporation in the Eastern District of Virginia, and in that capacity supported the trustees' recommendation that the reorganization court authorize the instant suit. The Commission supported, *amicus curiae*, the position of the respondent trustees in the courts below and does so in this brief.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 142–149) is reported at 159 F. 2d 67. The opinion of the District Court (R. 126–138) is reported at 67 F. Supp. 223.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 10, 1946 (R. 149–150). The petition for a writ of certiorari was filed on January 4, 1947, and was granted on February 10, 1947 (R. 151). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a Chapter X trustee, who has discovered in the course of his investigation pursuant to Section 167 of the Bankruptcy Act causes of action against the management of a debtor and affiliated interests, and who has been specifically authorized to sue by the reorganization court, may bring suit thereon in a federal district court other than the one in which the reorganization proceeding is pending, regardless of diversity of citizenship.

STATUTE INVOLVED

Section 2 (a) of the Bankruptcy Act of 1898, as amended (11 U. S. C. 11), provides:

> a. The courts of the United States hereinbefore defined as courts of bankruptcy

are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act * * * to —

* * * * * *

(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided * * *.

* * * * *

(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy: *Provided, however,* That the jurisdiction of the ancillary court over a bankrupt's property which it takes into its custody shall not extend beyond preserving such property and, where necessary, conducting the business of the bankrupt, and reducing the property to money, paying therefrom such liens as the court shall find valid and the expenses of ancillary administration, and transmitting the property or its proceeds to the court of primary jurisdiction; and * * *.

Section 23 of the Bankruptcy Act of 1898, as amended (11 U. S. C. 46), provides:

a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

Section 102 of Chapter X of the Bankruptcy Act of 1898, as amended (11 U. S. C. 502), provides in pertinent part as follows:

The provisions of chapters I and VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23 * * * shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive * * *.

STATEMENT

The respondents are the trustees of Central States Electric Corporation (hereinafter sometimes referred to as "Central States" or the "debtor"). Central States is a Virginia corporation which had filed a voluntary petition for reorganization in the United States District Court for the Eastern District of Virginia[1] pursuant to Chapter X of the Bankruptcy Act. Respondents' appointment as trustees under Chapter X followed the decision of the Circuit Court of Appeals for the Fourth Circuit in *Matter of Central States Electric Corporation,* 143 F. 2d 684, where the court said (p. 686):

> The great losses sustained by the corporation [Central States] the gross mismanagement shown, the clear abuse of power by corporate officers in contracts made for and with the corporation, the recommendation of the governmental agency charged with the supervision of matters of this sort,—all of these called for an investigation of the most complete and thorough-going character, with opportunity to examine under oath those who had knowledge of the corporation's affairs and with institution of suits for recovery, where probable liability had been shown, to the end that all the processes of discovery provided by law might be fully used.

[1] Hereinafter sometimes referred to as the "Chapter X" or "reorganization" court.

The trustees reported to the reorganization court the results of their investigation and recommended the bringing of the instant suit to recover on behalf of the debtor damages against the present defendants-petitioners for mismanagement of the debtor in their capacity as officers, directors and controlling stockholder of the debtor and as participants in that mismanagement. Pursuant to that report and recommendation of the trustees, the reorganization court authorized and directed the respondents to institute the present action in the United States District Court for the Southern District of New York (R. 4).

The complaint (R. 3–121) alleges that Harrison Williams, as controlling stockholder of Central States, and the other petitioners, fraudulently conspired to waste, destroy, misappropriate and otherwise wrongfully deal with the property and assets of the debtor and that they were guilty of breach of trust and waste of assets. It is further alleged that there was fraudulent concealment by the petitioners of the facts supporting these allegations so that they were not discoverable until after the respondents' investigation was ordered by the Chapter X court on November 15, 1944 (R. 9; 90–93). Respondents, as Chapter X trustees, seek an accounting with respect to losses and profits involved in these transactions and claim damages in excess of $39,000,000, exclusive of interest (R. 89, 93–95).

Petitioners moved to dismiss the complaint upon two principal grounds: (1) that the United States District Court for the Southern District of New York lacked jurisdiction over the subject matter of the action, and (2) that the cause of action was barred by the New York statute of limitations (R. 121–5). The District Court granted the motion on the first ground and did not decide the issue as to the statute of limitations (R. 127–138).[2] Although concluding that it had no jurisdiction over the matter, the District Court stated (R. 137) that—

> As a matter of policy, there does not seem to be any valid reason why the trustee in a reorganization proceeding should not be permitted to institute in a district court, other than the Court of his appointment, a plenary suit against an adverse claimant, such as these defendants, without a showing

[2] The opinion of the District Court states that if it had jurisdiction, the motion would have been denied on the statute of limitations point (R. 138). The District Court expressed no opinion whether, in the event it had jurisdiction under the Bankruptcy Act, it would be required to follow the state statute of limitations. See *Guaranty Trust Company* v. *York*, 326 U. S. 99; *Holmberg* v. *Armbrecht*, 327 U. S. 392. See also *Angel* v. *Bullington*, No. 31, this Term, decided February 17, 1947. The intimation was that if would be necessary to resolve issues of fact before determining whether the cause of action would be barred by the New York statute, if controlling. While the question as to the applicable statute of limitations in the federal court is not presently before this Court, it does have a bearing upon the significance of the issue as to the availability of a federal forum.

of diversity of citizenship as the basis of federal jurisdiction.

The Circuit Court of Appeals reversed the District Court and held that the Bankruptcy Act conferred jurisdiction in this case upon the District Court even though it was not the district court in which reorganization proceedings under Chapter X were pending and regardless of whether there is or is not diversity of citizenship here (R. 142–149).[3] It is this judgment which is now before this Court for review.

SUMMARY OF ARGUMENT

The court below was clearly correct in sustaining the jurisdiction of the District Court and holding that the Bankruptcy Act grants jurisdiction to all district courts (regardless of whether the bankruptcy proceeding in question is there pending) to hear suits *in personam* by Chapter X trustees for the recovery of assets of the estate.

Chapter X is specially adapted to the reorganization of large corporations with multi-state interests. The collection of causes of action against powerful corporate insiders was emphasized in the investigations and studies leading up to the enactment of Chapter X which contained new provisions imposing upon the independent trustee the duty to investigate and prosecute such claims.

[3] The Circuit Court stated (R. 149) that "Since jurisdiction results from the provisions of the Bankruptcy Act, we need not discuss the claim of jurisdiction based on the Judicial Code."

Accordingly, the Chapter X trustee is even more concerned with collection of such claims than an ordinary trustee in bankruptcy, particularly with reference to causes of action against defendants residing outside the district of appointment.

Section 216 (13) of Chapter X unmistakably implies that a Chapter X trustee will at least commence plenary actions prior to consummation of a plan. The importance which Congress attached to such suits indicates an intent to confer a broader choice of venue rather than a narrower one. The legislative trend with respect to choice of forum in actions of this general nature has been to widen the trustee's opportunity to reach defendants. Reorganization courts and the trustees whom they appoint can be trusted not to abuse the jurisdiction thus accorded by flooding the federal courts with trvial suits.

The specific legislative background of Section 102 indicates clearly that it was the express purpose of those who urged exclusion of Section 23 from Chapter X to broaden the jurisdiction of the federal district courts in respect to such plenary suits. This intention was effectuated through the enactment of Section 102 which incorporates Section 2. (a) (7) into Chapter X and specifically makes Section 23 inapplicable. The effect of this was to permit full scope to the broad grant of jurisdiction to the district courts, as set forth in Section 2 (a) (7), to cause the estates of bankrupts (and Chapter X debtors) to be collected and to

determine controversies in relation thereto, the limitations of Section 23 upon the bringing of plenary actions for this purpose having been eliminated by Section 102 of Chapter X.

Section 2 (a) (7) on its face is clearly a source of jurisdiction for all district courts of the United States (which are "courts of bankruptcy" under Section 1 (10) of the Act) over plenary suits *in personam* by trustees for recovery of the assets of the estate.

There is no merit to petitioners' contention that the word "proceedings" as used in Section 2 (a) is a word of art which, regardless of context, is limited to administrative and summary proceedings. Reference to this term as employed in various other contexts in the Act and to the Congressional reports makes it clear that no such narrow meaning is to be attributed to the phrase "proceedings under this Act" as used in Section 2 (a). Moreover, Section 102 includes only those sections of the earlier chapters of the Act which are not inconsistent with Chapter X. This makes it obvious that Chapter X contemplates the exercise of jurisdiction by federal courts as "courts of bankruptcy" over plenary actions *in personam* because otherwise there would be no point in making Section 23, which deals only with plenary actions, inapplicable to proceedings under Chapter X.

Nor is there any merit to petitioners' claim that "courts of bankruptcy" include only the

court in which the petition was filed. Such a contention is repugnant to the definition contained in Section 1 (10) of the Act which expressly states that "'courts of bankruptcy' shall include the district courts of the United States." It is also at odds with Section 2 (a) (20) of the Act which makes plain that all the district courts of the United States are intended to have ancillary jurisdiction, over persons as well as over property, in aid of trustees appointed in other courts.

Dicta found in decisions of this Court relied on by petitioners stand for no more than the proposition that when Section 23 and Section 2 of the Act are both applicable, the former is to be looked to on questions of jurisdiction because of its complete statement as to jurisdiction over plenary suits. These decisions do not hold that Section 23 (b) is the exclusive source of jurisdiction for the bringing of plenary suits. Indeed, reference to the earlier Bankruptcy Act provisions when Section 23 (b) was not in existence and to the decision of this Court in *Lathrop* v. *Drake*, 91 U. S. 516, construing those provisions, makes it clear that Section 2 (a), subject to the limitations of Section 23 (b), affords a broad basis for jurisdiction over plenary suits. Moreover, a number of other opinions of this Court describe more precisely than the cases relied on by petitioners the interrelationship of Sections 2 (a) (7) and 23 so as to indicate that the basic source of jurisdiction is in Section 2 (a) (7) upon which

Section 23 (b) was a limitation. *Kelley* v. *Gill*, 245 U. S. 116, 119; *Whitney* v. *Wenman*, 198 U. S. 539, 549, 550; *Babbitt* v. *Dutcher*, 216 U. S. 102; *Wood* v. *A. Wilbert's Sons Shingle & L. Co.*, 226 U. S. 384; *Collett* v. *Adams*, 249 U. S. 545; *Flanders* v. *Coleman*, 250 U. S. 223.

ARGUMENT

THE DISTRICT COURT HAS JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION UNDER SECTION 2 (A) OF THE BANKRUPTCY ACT WHICH IS MADE APPLICABLE TO PROCEEDINGS UNDER CHAPTER X

Section 102 of Chapter X provides in part:

> The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That Section 23 * * * shall not apply in such proceedings unless an order shall be entered directing that bankrupty be proceeded with pursuant to the provisions of chapters I to VII, inclusive * * *.

Among the sections of the Bankruptcy Act so incorporated in Chapter X and not excluded by the proviso is Section 2 (a) (7), which provides:

> The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with

such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, * * * to—

* * * * * * *

(7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided * * *.

The "except as herein otherwise provided" clause of Section 2 (a) (7) refers only to Section 23 of the Act,[1] which is expressly made inapplicable to Chapter X proceedings by Section 102. Section 23 provides:

a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings

[1] This Court so stated in *Bryan* v. *Bernheimer*, 181 U. S. 188, 194, and *First Nat. Bank* v. *Title & Trust Co.*, 198 U. S. 280, 288.

> under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

As Mr. Justice Brandeis stated in *Kelley* v. *Gill*, 245 U. S. 116, 119, which involved a plenary action by a trustee in bankruptcy:

> Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." But § 23–b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankrupcy not intervened.[5]

The decision of the court below rests fundamentally on the proposition that, with Section 23 (b) made inapplicable to Chapter X proceedings, the instant suit is maintainable under the broad grant of jurisdiction contained in Section 2 (a) (7).

Section 2 (a) (7), on its face, clearly gives to all district courts of the United States (which are

[5] The actual holding in the case was to deny jurisdiction in the federal court over a suit by the trustee to enforce the liability of the stockholders of the debtor for unpaid stock subscriptions, on the ground specified in Section 23 (b) that the bankrupt might not have brought such suit had bankruptcy not intervened.

"courts of bankruptcy" under Section 1 (10) of the Act and therefore within the scope of Section 2), jurisdiction broad enough to include plenary suits *in personam* by trustees in bankruptcy for recovery of assets of the estate.

Plenary suits *in personam* by a trustee are designed to "cause the estates of bankrupts to be collected" and the courts in which such suits are brought are asked "to determine controversies in relation thereto." Since it is the undisputed responsibility of trustees in bankruptcy under Sections 47 and 11 (c) of the Act to bring such suits, they are "proceedings under this Act" included in the jurisdiction conferred by Section 2 (a) (7) on the courts of bankruptcy. As noted above, these sections are incorporated in Chapter X by Section 102. See also Section 187. It follows that a trustee may bring such plenary proceedings, subject to any applicable restrictions as to forum, either in the court of his appointment or in some other court of bankruptcy. This is further emphasized by Section 2 (a) (20) which authorizes the courts of bankruptcy to "Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

In upholding the jurisdiction of the District Court under Section 2 (a) (7) of the Bankruptcy Act the court below stated (R. 144):

> * * * So broad a grant of power would seem to confer extensive jurisdiction upon the United States courts for the collection of a bankrupt's assets, subject to the usual protective requirements as to service of process within the district and as to venue; and such has been the conclusion of text writers, supported by a holding under the earlier Bankruptcy Act. *Lathrop* v. *Drake*, 91 U. S. 516; 6 Collier on Bankruptcy, 14th Ed., § 3.20, p. 672; Gilbert-Collier on Bankruptcy, 4th Ed. 1937, 63; Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act*, 52 *Harv. L. Rev.* 1, 21.

The court below also held that the purpose of the Congress in making Section 23 inapplicable in proceedings under Chapter X was to remove limitations which might otherwise bar access to the federal courts in suits brought by a Chapter X trustee.

Petitioners argue, however, that the words "proceedings under this Act" as used in Section 2 (a) (7) can mean, irrespective of context, only the exclusive and summary jurisdiction of the bankruptcy court which appoints the trustee and that this jurisdiction extends only to directing the trustee to sue (Br. pp. 8–9). Petitioners would thereby restrict the meaning of "proceedings" to summary rather than plenary proceedings, and have the words "determine controversies in relation thereto" mean only the determination of any

administrative dispute as to whether or not suit should be brought, not the determination of any controversies with defendants in suits to collect assets. We show below, pp. 37 *et seq.*, that both of petitioners' restrictive constructions of Section 2 (a) (7) are without merit.

Petitioners also rely on certain decisions of this Court under the Bankruptcy Act of 1898 as intimating, in a context in which both Section 2 (a) (7) and Section 23 are applicable, that Section 23 (b), to the exclusion of Section 2 (a) (7), should be looked to as a source of jurisdiction to bring plenary suits within the limitations set forth in Section 23 (b). Accordingly, they argue that the necessary effect of making Section 23 inapplicable in Chapter X proceedings is to remove a grant of jurisdiction and to narrow access by the trustee to the federal courts rather than to remove limitations thereon.

The historic purpose of Section 23, we will show, was to limit, and specify with particular reference to plenary proceedings, the broad grant of jurisdiction conferred upon the district courts as courts of bankruptcy by Section 2 (a) (7), although in its earlier form Section 23 did grant certain jurisdiction over plenary proceedings to the circuit courts.* However, we believe petitioners'

*Section 23 (a) as originally in effect contained an affirmative grant of jurisdiction over such plenary suits to the circuit courts, which were not courts of bankruptcy as defined in Section 1 (10) of the Act. When the circuit

difference with the court below concerning the historic setting of Section 23 in the Bankruptcy Act of 1898 and the further dispute as to what this Court decided in *Lathrop* v. *Drake*, 91 U. S. 516, with respect to the interpretation of the Bankruptcy Act of 1867, are less relevant to the present issue than what Congress intended by providing in Section 102 of Chapter X that Section 23 of the Bankruptcy Act "shall not apply in" proceedings under Chapter X.

A. THE PURPOSE OF CONGRESS IN ENACTING CHAPTER X WAS TO ENLARGE RATHER THAN RESTRICT THE TRUSTEE'S CHOICE OF FORUM IN BRINGING PLENARY SUITS

As this Court stated in *Securities and Exchange Comm.* v. *U. S. Realty and Improvement Co.*, 310 U. S. 434, 447:

> * * * Chapter X, devised as a substitute for the equity receivership, is specially adapted to the reorganization of large corporations whose securities are held by the public, and sets up a special procedure for the protection of widely scattered security holders and the public * * *.

An aspect of the protection of public security holders in the reorganization of large corporations which was much stressed in the legislative back-

courts were abolished, Section 23 (a) was amended so as to substitute district courts for circuit courts, thereby making Section 23 (a) somewhat repetitious of the grant of jurisdiction already contained in Section 2 (a) (7) and of the limitations stated more explicitly in 2 (b).

ground of Chapter X concerns the problem of investigation and prosecution of claims against corporate insiders. Section 77B had been severely criticized for inadequacy of its provisions to deal with this problem.[7] A Senate report recommending the Chandler Bill (S. Rep. No. 2084, 75th Cong., 3rd sess. p. 2) listed six major abuses of 77B proceedings and summarized the remedy provided by the Bill. We repeat below the first abuse listed and the remedy indicated therefor in the form set forth in that summary:

ABUSES	THE REMEDY PROVIDED BY THE CHANDLER BILL
1. Diversion of assets from the estate and concealment of the facts from creditors.	Chapter 10, article 7, section 167, provides, among other things, that if the judge shall so direct the trustee shall investigate the acts, conduct, and property and shall report to the judge any facts ascertained by the trustee pertaining to the fraud, misconduct, and to any causes of action available to the estate.

[7] The recommendation of the Securities and Exchange Commission which led to enactment of Chapter X stated on this point:

"In every case a qualified and disinterested trustee should be appointed * * * The appointment of an independent trustee is designed * * * to make it impossible to leave these estates in the hands of those whose mismanagement may have given rise to the need for reorganization. * * * the independent trustee should be authorized and directed: to make an investigation in every case of the condition of the company and of the events antedating the failure, with the three-fold objection

Accordingly, Chapter X of the Bankruptcy Act provides for the appointment of disinterested and independent trustees in corporate reorganizations (Section 156, 11 U. S. C. 556) and places upon such trustees the obligation to investigate causes of action against the management and affiliated interests and to bring suit on such causes of action (Section 167, 11 U. S. C. 567).[4] Section 167 (3) of the Act provides that the trustee "shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate." The Senate report stated with reference to this provision that it "insures prosecution of all causes of action," which "in some cases add to the assets of corporations in reorganization."

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* * * (3) of disclosing and diligently pursuing corporate assets in the form of claims against directors, officers, their affiliated interests and others who may have misused corporate control for their personal benefit." Securities and Exchange Commission, *Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees*, pt. I (1937), pp. 898-899. Reference to these recommendations is made in S. Rep. No. 1916, 75th Cong., 3d sess., p. 20. Similar recommendations were made in the report of the counsel to the Special Committee of the Senate which investigated Receivership and Bankruptcy Proceedings, S. Doc. No. 268, 74th Cong., 2d sess., at pp. 29-30.

[4] As previously noted, the Chapter X trustee specifically derives his authority to sue on such claims from Sections 47 and 11 (e), made applicable to Chapters X by Sections 102 and 187. See also Section 216 (13).

S. Rep. 1916, 75th Cong., 3d sess., p. 29. This Court adverted to these provisions in *Brown* v. *Gerdes*, 321 U. S. 178, 182, where it spoke of "the purpose of the Act to protect the security holders against previous acts of mismanagement and to preserve all assets of the estate (S. Rep. No. 1916, 75th Cong., 3d Sess., p. 22; H. Rep. No. 1409 [75th Cong., 1st Sess.], pp. 42–44)." The reorganization proceedings for Reynolds Investing Company, out of which that case arose, illustrate the importance of these provisions. Investigations in that case resulted in judgments for millions of dollars against former officials of the investment company for mismanagement, and the collection of substantial portions of the judgments.

Petitioners brush aside these provisions and argue that according the trustee an opportunity to litigate plenary actions *in personam* in the federal courts is less relevant to the purposes of Chapter X than to other bankruptcy proceedings. They say (Br. 26), "The prime function of a bankruptcy trustee is to liquidate, collect and distribute. The reorganization trustee's purpose is not primarily liquidation but to maintain the *status quo* and to realign interests." They also say "if reorganization efforts fail and liquidation is ordered, the trustee is given an additional aid for liquidation by the grant of jurisdiction over

Section 23."[9] Answering similar arguments the court below stated (R. 148-9):

> Chapter X was enacted largely because of the many abuses which developed in reorganizations under § 77B. One of these was the retention of control over the debtor corporation during reorganization by "insiders" who frequently sought to conceal and to prevent rigorous prosecution of possible causes of action against the debtor's former management. Report on Protective and Reorganization Committees, Pt. 1, S. E. C., 1937, 865; N. Y. Leg. Doc. No. 66, 159th Sess., 1936, 22; Note, 50 Yale L. J. 1492, 1496. To combat this and other abuses the draftsmen of Chapter X strengthened the hand of the reorganization trustee by giving him access to lists of the debtor's security holders, in whosever hands they may be, § 165, 11 U. S. C. A. § 565, by placing upon him the duty of formulating the plan of reorganization, § 169, 11 U. S. C. A. § 569, and perhaps most important, by giving him broad powers of scrutiny of the conduct of the debtor's business by the debtor's former management, § 167, 11 U. S. C. A. § 567. In view of the Congressional purpose demonstrated by these provisions, it seems clear that in eliminating § 23 from corporate reorganizations under Chapter X, Congress intended to enlarge,

[9] Petitioners somewhat inconsistently urge that in view of *Erie Railroad* v. *Tompkins*, "Federal jurisdiction over suits on state-created rights would confer no advantage on the trustee." (Br. 26) Cf. note 2, *supra*, p. 7

rather than restrict; the trustee's choice of forum in prosecuting causes of action against former controllers of the debtor. This is the view of Professor Moore and of Mr. Gerdes. 6 Collier on Bankruptcy, 14th Ed., §3.20 (containing specific criticism of the opinion of the district court); 2 *id.*, § 23.12; Moore' Bankruptcy Manual, 1939, 494; Gerdes, *Corporate Reorganizations—Changes Effected by Chapter X of the Bankruptcy Act* (1938) 52 Harv. L. Rev. 1, 21.

To adopt the narrow construction urged by petitioners with reference to the elimination of Section 23 would be to hold that without diversity of citizenship a Chapter X trustee is unable to sue in the federal courts even where the defendant consents, although a mere trustee in bankruptcy could do so. Another result would be to substitute diversity of citizenship between the trustee and defendant for the rule under Section 23 whereby jurisdiction, in so far as related to diversity, rests upon diversity between the bankrupt and the defendant. Having diversity jurisdiction rest solely upon diversity between the trustee and the defendant, ignoring citizenship of the debtor, could have no relationship to any policy of Congress in connection with Chapter X.

Section 216 (13) of Chapter X refutes petitioners' claim that the collection of assets of the estate through plenary proceedings has no relevance to the duties of a Chapter X trustee with reference to reorganization and becomes relevant,

only in the event of liquidation. Section 216 (13), 11 U. S. C. 616 (13) makes it mandatory for the plan to provide for the retention and continued enforcement by the disinterested trustee of all claims not yet settled or adjusted.[*] This section unmistakably implies that, where warranted by his investigation, a Chapter X trustee will at least start the prosecution of plenary actions against the old management prior to the consummation of a plan. Moreover, reorganization, not an order for liquidation under Section 236, is so much the norm of Chapter X proceedings that the test of "good faith" in the filing of a petition relates *inter alia* to the bona fide expectation that a plan will result. See Section 146 (3). Petitioners' argument that Congress regarded Section 23 as an exclusive grant of jurisdiction with respect to plenary suits, and intended such jurisdiction to be exercised in connection with a Chapter X proceeding only in aid of liquidation, assumes that

[*] Subsection 13 of Section 216 was added in accordance with recommendations made to the Senate Committee on behalf of the Securities and Exchange Commission that "it occurred to us in our reexamination of the bill that the bill does not now indicate the manner in which such claims shall be enforced, either during the proceeding or after the debtor enterprise has been reorganized. We believe this is an omission which should be corrected." See statement of Martin Riger of the staff of the Securities and Exchange Commission, Hearings on H. R. 8046, 75th Cong., 2d sess., p. 124. The explanation accompanying Section 216 (13) states, "Claims retained may be enforced, if necessary, even after consummation of the reorganization." S. Rep. No. 1916, 75th Cong., 2d sess., p. 35.

Congress intended the Chapter X trustee to defer the bringing of suits on meritorious claims on behalf of the estate upon the chance merely that the reorganization purpose would fail and liquidation be ordered. Obviously Congress intended no such impractical course. To the contrary, the importance which Congress attached to the enforcement of causes of action on behalf of the estate demonstrates the relevance to purposes of Chapter X of according the trustee, subject, of course to the control of the reorganization court, a broader choice of forum than is accorded in ordinary bankruptcy proceedings. Significantly Chapter XI, which is a readjustment and not a liquidation statute, but is inapplicable to the larger interstate corporations, retains the limitations of Section 23 with respect to the bringing of plenary suits.

Petitioners argue that the decision of the court below will expose the federal courts to a flood of trivial litigation which might more properly be prosecuted in the state courts, and cite the experience with the Bankruptcy Act of 1867 described in the discussion by the Chairman of the Judiciary Committee which preceded the enactment of the Bankruptcy Act of 1898. See 31 Cong. Rec. 1785, quoted in part by petitioners at Br. 22–23. Reference was indeed made to a situation under the earlier Act in which nearly all plenary suits by bankruptcy trustees were brought in the federal courts. Petitioners' argument,

based on this history of the 1898 Act overlooks both the power of a reorganization court to instruct the Chapter X trustee in respect of his choice of forum as well as the distinction between opening the federal courts to all plenary suits by trustees in bankruptcy and according a more limited federal jurisdiction as to suits deemed of special importance.

It should be noted in that connection that the original limitations in Section 23 of the Act of 1898 with respect to the bringing of plenary suits in the federal courts have been successively and deliberately modified to afford trustees in bankruptcy a wider choice of forum with respect to classes of suits regarded as particularly vital to the bankruptcy process. Thus the 1903 amendments excepted from the limitations of Section 23 (b) actions pursuant to Section 60 (b) and 67 (e) relating to preferences and voidable transfers (Section 8 of the Act of Feb. 5, 1903, c. 487, 32 Stat. 798). Again in 1910 a further exception was made with respect to actions under Section 70 (e) to set aside fraudulent conveyances (Section 7 of the Act of June 25, 1910, c. 412, 36 Stat. 840). The typical claim which Congress was specifically interested in having investigated and prosecuted by Chapter X trustees involved the diversion of assets and related wrongs by insiders and is a counterpart in large corporate affairs of the old-fashioned fraudulent conveyance. It is thus entirely consistent with the legislative trend since 1903 to provide, with

respect to Chapter X proceedings, for this further exception. The only difference between this and the earlier amendments is a matter of mechanics. Instead of adding to the exception clauses in Section 23 (b), Section 102 of Chapter X, which undertakes generally to specify the applicability of Bankruptcy Act provisions in proceedings under Chapter X, lists Section 23 as among the sections made inapplicable.

Petitioners contend that Section 23 (b) is the exclusive source of jurisdiction over plenary suits, and that it was eliminated from Chapter X because that Chapter in no way was concerned with plenary suits.[11] The decisions of this Court make it clear that Section 2 (a) (7) on its face includes a broad source of jurisdiction subject only to the limitations of Section 23 when applicable. Thus, in *Whitney* v. *Wenman*, 198 U. S. 539, 549, 550, this Court stated that in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, "it was held that the power conferred in subdivision 7 of section 2 * * * was limited by the direct provisions of section 23 as to the jurisdiction of suits brought by trustees." In *Kelley* v. *Gill*, 245 U. S. 116, 119, the Court spoke of Section 2 (a) (7) as conferring jurisdiction and

[11] This latter contention is made categorically in several places in petitioners' brief in this Court (Br. 6–7, 25, 27), and it was made without exception thereto in the court below. However, there are several indications in the present brief that they have retreated to some extent from their earlier characterization of Chapter X as wholly unconcerned with plenary suits by the trustee.

continued: "But § 23–b prohibits the trustee * * * from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened * * *." And in *Lynch* v. *Bronson*, 160 Fed. 139, 140 (D. Conn.), the court stated: "subdivision 7 of section 2 would confer jurisdiction if it were not for the limiting words, 'except as 'herein otherwise' provided.' * * * It is settled law that the exception points to section 23. * * *"[12].

The fact that plenary jurisdiction is conferred by Section 2 (a) (7) subject only to the restriction of Section 23, when applicable, is further supported by the legal writers. Thus, for example, in *Gilbert's Collier on Bankruptcy* (4th ed. 1937), p. 63, in discussing Section 2 (a) (7), the authors state: "Unless otherwise provided in the Act, the power conferred by this subdivision appears to be plenary." And in 2 *Collier on Bankruptcy* (14th ed. 1940), par. 23.12, p. 545, it is pointed out that "Section 23 * * * is a *limitation* 'as herein otherwise provided' on the broad grant of jurisdiction conferred on district courts by § 2a (6) and (7), and *must be considered as creating certain restrictions upon the district courts' power* which might otherwise be very extensive due to the

[12] See also *Bryan* v. *Bernheimer*, 181 U. S. 188, 194; *First Nat. Bank* v. *Title & Trust Co.*, 198 U. S. 280, 288.

general language of those provisions." [Italics supplied.] See also 2 Collier, *supra,* at p. 546.

Similarly in Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy* (1935) 20 Iowa L. Rev. 565, the author points out that jurisdiction over plenary actions by the trustees to recover assets of the bankrupt from adverse claimants is granted by Section 2 (a) (7) and that Section 23 has the effect of restricting that grant. Thus he states, *inter alia:*

> Unqualified by Section 23, Section 2 (7) would clearly seem to confer upon the federal district courts jurisdiction over any suit of the trustee to collect assets alleged to be a part of the estate. The difficulty in the Act is created by Section 23 and the extent to which it restricts the extensive grant of jurisdiction in Section 2 (7). * * * [p. 566].
>
> It is * * * apparent that the language of Section 23 cannot be so narrowly interpreted as to annul the grant of jurisdiction in Section 2 (7), but that some moderation must be exercised as to the extent to which it will be permitted to restrict that grant. * * * [p. 567].

The purpose of Congress to give Chapter X trustees a broader choice of forum than is accorded an ordinary trustee in bankruptcy is further illustrated by the specific background of Section 102 of Chapter X and of the inclusion therein of Section 23 as one of the sections of

the Bankruptcy Act which are inapplicable in Chapter X proceedings. It had been the view of Mr. John Gerdes, a member of the National Bankruptcy Conference which sponsored the Chandler Bill, that "the limitations of Section 23 of the Bankruptcy Act must be held to be inapplicable since they are inconsistent with the powers of an equity court, which powers are expressly given to the court in proceedings under Section 77B." 2 *Gerdes on Corporate Reorganization*, page 1478. But this view of Gerdes was questioned. See Finletter, *Principles of Corporate Reorganization* (1937), p. 187. And, after the enactment of Chapter X several courts in cases involving Section 77B proceedings upheld Finletter's view and rejected that of Gerdes. *In re Prima Co.*, 98 F. 2d 952 (C. C. A. 7); *In re Standard Gas and Electric Co.*, 119 F. 2d 658 (C. C. A. 3); *Tilton* v. *Model Taxi Corporation*, 112 F. 2d 86 (C. C. A. 2).

Gerdes appeared before the Subcommittee of the Senate Judiciary Committee which was considering H. R. 8046, the Chandler Bill, and proposed on behalf of the National Bankruptcy Conference a number of specific amendments. Section 102 of the bill then under consideration merely provided "Wherever applicable and not inconsistent with the provisions of this Chapter, the provisions of this Act shall apply in the proceedings under this Chapter." Gerdes' proposal, which was adopted, made expressly inapplicable to proceedings under Chapter X certain enu-

merated sections of the Act, including Section 23. Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 75th Cong., 2d sess., on H. R. 8046, pp. 76-77. Some of these sections but not Section 23 had been expressly made inapplicable to Section 77B proceedings under Section 77B (k). In that connection Gerdes said (Hearings, p. 77):

> Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions [as] are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable. * * *
>
> In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt. The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X.

Subsequently, Mr. Gerdes commented upon this change as follows (*Corporate Reorganizations:*

Changes Effected by Chapter X. of the Bankruptcy Act (1938) 52 Harv. L. Rev. 1, 21):

> The bankruptcy provision restricting plenary jurisdiction has been expressly excluded from application so that the equity receivership jurisdiction over plenary actions which are ancillary to the main proceedings is still available, even though the controversy involves less than $3,000 and even though there is no diversity of citizenship.

Professor Moore expressed a similar view with respect to Section 102. In *Moore's Bankruptcy Manual* (1939), p. 494, he said—

> Sections 23 (a) and (b) limit the jurisdiction of the United States district courts in plenary suits against adverse claimants (other than those by a trustee to set aside preferences or fraudulent conveyances) to cases where the defendant has consented or the bankrupt could have brought such suit in a federal court. *Their express elimination from reorganization proceedings makes it clear that plenary suits by trustee or receiver are maintainable in the federal courts as ancillary to bankruptcy reorganization whether or not separate grounds for federal jurisdiction exist.* [Italics supplied.]

In *In Re Standard Gas and Electric Co.*, 119 F. 2d 658, the Circuit Court of Appeals for the Third Circuit clearly implied that the effect of the enactment of Chapter X was to remove a pre-

existing barrier to plenary suits, but held that since the case before it involved a suit by a section 77B trustee instituted prior to the enactment of Chapter X, it was not maintainable in the federal court in the absence of diversity. See also *Brown* v. *Gerdes*, 321 U. S. 178, in which this Court likewise assumed, although it was not necessary to the decision, that the elimination of Section 23 had the effect of broadening the availability of the federal courts in the case of plenary suits by a Chapter X trustee.

In *In re Cuyohoga Finance Company*, 136 F. 2d 18, 20 (C. C. A. 6), the court referred to the enactment of Chapter X as follows:

> One of the purposes of the statute was the enlargement of the jurisdiction of the court. The restrictions of Section 23 (11 U. S. C. A. Sec. 46) were abrogated unless the proceeding degenerated into ordinary bankruptcy. The statute expanded the former Act to give the court in reorganization proceedings such jurisdiction as a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet debts as they matured. 11 U. S. C. A. Sec. 515, 52 Stat. 884.

See also *Warder* v. *Brady*, 115 F. 2d 89, 93, 94 (C. C. A. 4), *In re Quick Charge, Inc.*, W. D. Okla., January 27, 1947, C. C. H. Bankruptcy Law Service, par. 55,835, at p. 58,069.

Despite their principal argument that Chapter X was intended to withdraw from the trustee the authority which an ordinary bankruptcy trustee has to maintain plenary suits in the federal courts, petitioners offer the inconsistent suggestion that, in eliminating Section 23 from Chapter X proceedings, Congress intended to remove a limitation which Section 23 had been held to impose upon the equity receivership power of a Section 77B court over plenary actions conferred by Section 77B (k), the predecessor of Section 115 of the Bankruptcy Act. Thus, petitioners state that the elimination of Section 23 from Chapter X was intended only to make clear that the court in which the petition was filed would have the jurisdiction which a court of the United States would have if it had appointed an equity receiver. Petitioners concede the power in the court of appointment to litigate plenary claims (Br. 28). In describing this jurisdiction as ancillary, petitioners refer to the equity receivership practice under which plenary suits could be brought, irrespective of diversity, either in the federal court of original appointment or in another federal court which had appointed an ancillary receiver. Petitioners argue that this practice precluded appointment of an ancillary receiver unless there was tangible property as distinguished from an *in personam* claim against the defendant, within the district where ancillary jurisdiction was sought. See

Mitchell v. *Maurer*, 293 U. S. 237, 243. Petitioners suggest (1) that when Section 115 states "upon the approval of a petition, the court" shall have the same powers as if it had appointed an equity receiver, the reference to *the court* (italicized by petitioners) means only the court of appointment, and (2) that any other federal court has jurisdiction to entertain a plenary suit by a Chapter X trustee without regard to diversity of citizenship only if it could have entertained a petition for the appointment of an ancillary receiver under the equity precedents (Br. 27–29).

Once it is concluded, however, that Congress intended, by making Section 23 inapplicable, to enlarge rather than to restrict access to the federal courts in the case of plenary suits brought by a Chapter X trustee, then there is, we submit, no rational basis for assuming that the enlarged jurisdiction thereby conferred upon the federal courts was intended to be hedged with venue restrictions which would defeat recovery by preventing suit where potential defendants might be amenable to process. Even if it were held, contrary to a number of decisions in circuit courts of appeals, that process of the reorganization court may be served throughout the United States for the purpose of proceeding *in personam* as well as to protect the court's exclusive jurisdiction over the property of the debtor,[13] there would

[13] See *In re of Standard Gas & Electric Co.*, 119 F. 2d 658 (C. C. A. 3); *In re Prima Co.*, 98 F. 2d 952 (C. C. A. 7).

be no reason to preclude seeking, on grounds of convenience, an alternative federal forum in another district wherein defendants might reside. There is thus no basis in policy or in the text of the sections of the Act applicable to Chapter X for reading into the new grant of power the cumbersome and artificial limitations upon the territorial jurisdiction of the reorganization court which it was a common purpose of Section 77B and Chapter X to remove.

The trustees argue that the term "court" as used in section 115 includes any court of bankruptcy. We do not find it necessary to rest our argument on this interpretation of Section 115 by itself, inasmuch as section 2 (a) (20) expressly gives "ancillary jurisdiction" to the courts of bankruptcy "over persons or property within their respective territorial limits in aid of a receiver or trustee appointed * * * in any other court of bankruptcy."[1] With the limitations of section 23 removed, there is no reason why Section 2 (a) (20) does not, to the extent necessary, cover ancillary jurisdiction in aid of the Chapter X trustee's functions *qua* equity receiver as well as in aid of his explicit functions *qua* trustee to collect assets of the estate. In either capacity we believe it clear that Congress intended by the excision of Section 23 to effectuate a comprehensive federal jurisdiction to col-

[1] Section 2 (a) (20) is incorporated into Chapter X by Section 102 thereof.

lect the assets of an estate in aid of a Chapter X reorganization.

B. THE COURT BELOW PROPERLY REJECTED PETITIONERS' CONTENTION THAT THE REFERENCE TO "PROCEEDINGS" AND "CONTROVERSIES" IN SECTION 2 (a) (7) WAS ONLY A REFERENCE TO SUMMARY PROCEEDINGS, AND THAT SECTION 102 WAS DESIGNED SOLELY TO MAKE SECTION 23 INAPPLICABLE TO ADMINISTRATIVE PROCEEDINGS IN THE CHAPTER X COURT

Petitioners urge here, as they did in the court below, that wherever the term "proceedings" is found in the Bankruptcy Act it refers, irrespective of the context in which it appears, to summary proceedings only and not at all to plenary actions such as the suit involved in this case. More specifically, the argument is that the grant of jurisdiction in Section 2 (a) of the Act is limited to "proceedings," i. e., summary proceedings, and that when Section 102 of the Act makes Section 23 inapplicable "in proceedings under Chapter X" it refers only to the administrative proceedings in the court of appointment. The *in personam* jurisdiction of the bankruptcy courts, according to their view, is derived only from Section 23, which gives the district courts "jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act," between trustees and claimants of property. Since this section is expressly made inapplicable to a reorganization proceeding unless an order is entered that liquidation be proceeded with (Section 102), petitioners claim that the Bankruptcy Act confers upon the district courts no

jurisdiction over a plenary suit brought by a Chapter X trustee.

This argument is based on an attempt to define the term "proceedings" very narrowly. It rests upon the assumption that, whenever used in the Act, the term "proceedings" is a word of art referring to the proceeding in bankruptcy or reorganization as such, and only that. Reference to a number of provisions of the Act makes it clear that the term has no such fixed meaning; rather, its meaning depends on the context in which it is used. At times the word "proceeding" is used interchangeably with "suit" or "action," at times to indicate bankruptcy proceedings of an administrative character, and at other times to signify both. For example, in Section 11 (e) trustees are authorized to "institute proceedings in behalf of the estate upon any claim * * *;" and in another connection, the same section refers to "any proceeding, judicial or otherwise"; and in Section 60 (b) "plenary proceedings" to recover preferences, or their value are authorized to be brought in a state court or "any court of bankruptcy."[15] These sections of the Act incorporated into Chapter X by Section 102 thereof, in pertinent part provide:

> Sec. 11(e) A receiver or trustee may * * * institute proceedings in behalf of

[15] By definition "'courts of bankruptcy' shall include the district courts of the United States * * *." (Sec. 1 (10)).

> the estate upon any claim * * * Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, * * * or where in any proceeding, judicial or otherwise, a period of limitation is fixed, * * * the receiver or trustee of the bankrupt may, * * * take any such action or do any such act * * *.
>
> Sec. 60 (b) * * * Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property. * * * For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

See also Section 70 (e) (2), which authorizes the trustee to recover property fraudulently transferred or to collect its value, and Section 70 (e) (3), which describes actions pursuant thereto as "plenary proceedings."

The Congressional reports also use the term "proceedings" in appropriate contexts to include suits. For example, in discussing actions by trustees and receivers, the House Report on Revision of the Bankruptcy Act described the proposed new Section 11 as authorizing prosecution of "suits" by receivers and trustees; nevertheless in the statute (Section 11 (c)) such suits are described both as

"proceedings" and as "suits." In discussing the provisions of Section 70 (e) (3) the committee used both terms "action" and "proceeding" interchangeably.[16] H. Rep. 1409, 75th Cong., 1st sess. pp. 20, 35. Moreover, Section 2 (a) (7) confers jurisdiction necessary for the collection of the estate which includes plenary suits *in personam.* Finletter, *Principles of Corporate Reorganization* (1937), pp. 190–200. That the collection of assets implies and includes jurisdiction to bring plenary suits was quite early recognized in *White* v. *Ewing,* 159 U. S. 36. The Court in referring to the jurisdiction of a circuit court to entertain a plenary suit by an equity receiver stated (p. 40):

> In this particular the jurisdiction of the Circuit Court does not materially differ from that of the District Court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted.

A similar view is indicated in *Kelley* v. *Gill,* 245 U. S. 116, 119, where in considering the lower court's jurisdiction over a plenary suit, Mr.

[16] "Clause (3): The provision with respect to concurrent jurisdiction appears in the present 70e. It has been expanded * * * where in a particular case a plenary action may be found necessary or advisable, and specifically provides that the concurrent jurisdiction shall relate only to plenary proceedings. For the sake of clarity and certainty the order in which the courts are mentioned is reversed." H. Rep. 1409, 75th Cong., 1st sess., p. 35.

Justice Brandeis referred to the jurisdiction conferred by Section 2 (a) (7) to collect the assets of the estate, subject to the limitations of Section 23 (b). It is petitioners' hypothesis that collection of the assets denotes only administrative and summary proceedings. Even assuming that "collection" has such a narrow meaning, it is clear that the additional jurisdiction conferred by Section 2 (a) (7) to "determine controversies in relation thereto" presupposes claims of adverse parties and the need at times for plenary action to effectuate the collection of the estate.[15]

Indeed, in the light of clause (20) of Section 2 (a), which confers upon a court of bankruptcy ancillary jurisdiction over "persons" as well as property in aid of a "trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy", it is clear that the jurisdiction conferred by Section 2 (a) includes in personam suits against adverse parties as well as purely administrative proceedings.

The fallacy in petitioners' argument is also illustrated by reference to Section 102 which makes certain other chapters of the Act applicable "in proceedings under this chapter [XI]." Petitioners' contention that Section 102 includes

[15] Further indication that collection of assets includes the bringing of suits is to be found in Section 70 of the Act. Clause (e) (2) authorizes the trustee to recover property or to "collect its value" and Clause (e) (5) provides for "plenary proceedings" in respect thereto.

only reorganization proceedings as such is inconsistent with the obvious purpose of Congress in making Section 23, which deals with plenary actions, inapplicable "in such proceedings." It is patent that unless such proceedings included plenary suits pursuant to Chapter X, there would have been no need to insert the proviso removing Section 23. The conclusion that Congress so intended is reinforced by reference to the fact that Section 102 specifically makes inconsistent provisions inapplicable and hence it was only because Section 23 might have been held applicable to proceedings under Chapter X that it was necessary to exclude it therefrom by specific reference. As the court below stated (R. 147, note 4), "* * * defendants' contention that Chapter X embraces only administrative proceedings in rem is not well taken. Under such a view, § 102 would be rendered meaningless, as purporting to prevent a section dealing solely with jurisdiction in personam from affecting proceedings in rem." Thus, the proviso in Section 102 makes it clear that the phrase "in proceedings under this chapter" includes plenary proceedings brought by a trustee.

Petitioners' further assertion that "courts of bankruptcy" include only the court in which the petition was filed is repugnant to the definition contained in Section 1 (10), which expressly states that "'Courts of Bankruptcy' shall include the district courts of the United States," and is

at odds with other provisions of the Act. Section 60 (b), for example, confers jurisdiction on "any court of bankruptcy" for "plenary proceedings" necessary to obtain reimbursement of preferences or their equivalent value, and *Collet v. Adams*, 249 U. S. 545, and *Lowenstein* v. *Reikes*, 54 F. 2d 481 (C. C. A. 2), make it clear that "courts of bankruptcy" include courts of the United States other than the court in which the petition was filed. See also Section 2 (a) (19) and (20) which expressly provide that the district courts of the United States are created "courts of bankruptcy" with jurisdiction to "(19) Transfer cases to other courts of bankruptcy;" and "(20) Exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy * * *."

C. THIS COURT'S CONSTRUCTION OF A SUBSTANTIALLY IDENTICAL PROVISION IN THE BANKRUPTCY ACT OF 1867 SUPPORTS THE VIEW OF THE COURT BELOW THAT SECTION 2 (a) (7) CONFERS JURISDICTION OVER THIS ACTION

Petitioners rely heavily upon certain dicta in *Bardes* v. *Hawarden Bank*, 178 U. S. 524, and *Schumacher* v. *Beeler*, 293 U. S. 367, to support their contention that Section 23 of the Bankruptcy Act is the sole source of jurisdiction in plenary suits by a trustee against adverse claimants rather than a limitation on jurisdiction granted by Section 2. The court below rejected

these cases as authorities because the expressions were only dicta in any event, and, further, because the dicta were erroneous in so far as they might be construed as intimating that Section 2 would not be a source of jurisdiction over plenary suits apart from Section 23.

The dicta in question are only indirectly relevant to the questions here presented, since they deal with situations under the Bankruptcy Act of 1898 where both Section 23 and Section 2 were applicable, and refer back to the Act of 1867 for its bearing upon the interpretation of the 1898 Act. While we believe the intention of Congress as specifically revealed in connection with the enactment of Chapter X controlling in any event, we nevertheless discuss the *Bardes* and *Schumacher* cases because of the great emphasis petitioners place upon them.

At the time of the *Bardes* case, Section 23 read as follows (30 Stat. at 552–553):

> SEC. 23. *Jurisdiction of United States and State Courts.*—a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had

been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this Act.

Section 23 (a) was thus a grant of jurisdiction to the circuit courts in respect of suits to the same extent as though the bankrupt were suing in the absence of bankruptcy. Section 23 (b) then stated in negative language that suits by the trustee shall only be brought, unless by consent of the defendant, in courts where the bankrupt might have sued. To the extent that 23 (b) applied to plenary suits in the district courts, which courts are not mentioned in either 23 (a) or 23 (b), it was obviously a limitation upon jurisdiction elsewhere granted and the only place to look for that grant of jurisdiction to the district courts was 2 (a) (7), which then read substantially as it does today.[18]

[18] In *Lowenstein* v. *Reikes*, 54 F. 2d 481 (C. C. A. 2), Judge Swan, in his dissenting opinion, made the follow-

Between the *Bardes* and the *Schumacher* case there had been the successive amendments to Section 23 in 1903 and 1910 which excepted from the limiting language in 23 (b) certain specified kinds of plenary suits. In addition, with the abolition of the circuit courts in 1911, the words "district court" were in effect substituted generally for "circuit court" and this later led to corresponding changes in the text of the Bankrupt Act itself. The 1903 and 1910 amendments had the effect of enlarging the jurisdiction of district as well as circuit

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ing illuminating statement on the restrictive nature of Section 23. He stated at p. 485:

"The exception 'herein otherwise provided' [in Section 2 (a) (7) of the present Bankruptcy Act] refers to section 23. Paragraph (a) of section 23, as originally enacted (30 Stat. 552), related only to the Circuit Courts. It invested them with 'jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees,' but limited it to the same extent as though bankruptcy had not intervened and the controversy were between the bankrupt and the adverse claimant. *Bush* v. *Elliott*, 202 U. S. 477, 26 S. Ct. 668, 50 L. Ed. 1114; *Goodier* v. *Barnes*, 94 F. 798 (C. C. N. Y.). Paragraph (b) of section 23 as originally enacted (30 Stat. 552) read as follows: 'b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.'

"As to plenary suits instituted by the trustee in the bankruptcy court to recover property in the possession of the adverse claimant, it is apparent that this subdivision was intended *to limit the jurisdiction which section 2* (7),

courts and were in that sense grants of jurisdiction to the district courts, even though this result was achieved by merely limiting the extent to which 23 (b) cut down jurisdiction which might otherwise have been granted by Section 2 (a) (7).

Against this background it is entirely understandable that the Court, in cases where it was not necessary to decide the effect of Section 2 (a) (7) standing alone, referred to Section 23 as a

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11 USCA § 11 (7), would otherwise have conferred upon courts of bankruptcy 'to determine controversies' in relation to the collection of the estates of bankrupts, to suits brought by the trustee with the consent of the defendant. See *In re Abraham*, 93 F. 767, 774 (C. C. A. 5). Hence, it was held in *Bardes* v. *Hawarden Bank*, 178 U. S. 534, 20 S. Ct. 1000, 44 L. Ed. 1175, that, where the defendant had not consented, the court of bankruptcy had no jurisdiction of a suit by a trustee to set aside a fraudulent conveyance. * * * Of course it was implied that with consent such a suit might be brought in the court of bankruptcy; and so it was later held. *Phillips* v. *Turner*, 114 F. 726 (C. C. A. 5); *In re Durham*, 114 F. 750 (D. C. Md.); *Boonville Nat. Bank* v. *Blakey*, 107 F. 891 (C. C. A. 7). But such consent was seldom given." [Italics supplied.]

We do not understand the majority of the court in *Lowenstein* v. *Reikes* to have rejected or controverted any part of the language quoted above from Judge Swan's dissenting opinion. The issue in the case was whether a suit by a trustee in bankruptcy, brought in a federal district court to avoid a preferential transfer made by the bankrupt prior to bankruptcy, is a "controversy arising in bankruptcy proceedings from a court of bankruptcy" within the meaning of Section 24 (a) of the Bankruptcy Act. The majority held that Section 24 (a) was not applicable and that therefore Section 25 (a), requiring an appeal to be taken within 30 days after judgment or decree, was also inapplicable.

grant of jurisdiction to the district courts. On the other hand, a number of other opinions of this Court described, we submit, more precisely the interrelationship of Sections 2 (a) (7) and 23 so as to indicate that the basic source of jurisdiction is in Section 2 (a) (7), on which Section 23 (b) is a limitation. See *Kelley* v. *Gill*, 245 U. S. 116, 119; *Whitney* v. *Wenman*, 198 U. S. 539, 549–550; *Babbitt* v. *Dutcher*, 216 U. S. 102; *Wood* v. *A. Wilbert's Sons Shingle & L. Co.*, 226 U. S. 384; *Collett* v. *Adams*, 249 U. S. 545; *Flanders* v. *Coleman*, 250 U. S. 223.

But, in any event, the language in the *Bardes* and *Schumacher* cases, upon which petitioners rely, rests upon a misconception of the interpretation given to the Act of 1867 by this Court's earlier decision in *Lathrop* v. *Drake*, 91 U. S. 516.

The Circuit Court of Appeals rejected the contention which petitioners now make in this connection and summarized its view of the matter thus (R. 146):

> These statements [in the *Bardes* and *Schumacher* cases] suggest that by an analogy drawn from the language of the Bankrutcy Act of 1867, § 2 of the present Act is a grant of summary jurisdiction only.
>
> The two cases apparently derived that conclusion from an interpretation of *Lathrop* v. *Drake, supra*, a decision which construed the Act of 1867 *and which, it seems now clear, should not be so interpreted.* It was

there held that the jurisdiction of the district courts over civil suits came from § 1 of that Act, which is now substantially embodied in § 2 of the present Act; and that § 2 of the 1867 Act, now repealed, which the two former cases regarded as the source of jurisdiction over civil suits, merely conferred a concurrent jurisdiction upon the circuit courts. The former cases, morever, were decided not under the Act of 1867, but under the Act of 1898; and they were concerned not with a construction of § 2, but with the applicability of § 23. *The statements in them from which defendants claim support are therefore merely dicta, and do not sap the vitality of the jurisdictional holding in the early case.* [Italics supplied.]

As the court below indicated, Section 2 of the present Bankruptcy Act of 1898 was derived from Section 1 of the Bankruptcy Act of 1867, and the two provisions are substantially identical as to the jurisdiction of the district courts. *Babbitt* v. *Dutcher*, 216 U. S. 102, 107; *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 534.[19] Although we do not believe that it is necessary to rely upon Section 1 of the Act of 1867 in order to reach the conclusion that Section 2 (a) (7) grants jurisdiction in this case, an examination of the earlier provision dis-

[19] In the *Bardes* case the Court stated (178 U. S. at 534) that Section 2 of the Bankruptcy Act of 1898 "takes the place of section 1 of the Act of 1867, and hardly differs from that section" except in certain particulars here not relevant.

closes strong support for the conclusion we advocate.

Preliminarily, it is worthy of note that the Act of 1867 contained no restrictive provision of the nature of Section 23 of the 1898 Act. Thus, Section 1 of the earlier Bankruptcy Act and Section 2 (a) (7) of the present Act, which is not in any way controlled or limited by Section 23 in proceedings brought by a Chapter X trustee, are even more identical than is the case where Section 23 is applicable, as in the *Bardes* and *Schumacher* cases.

Section 1 of the Bankruptcy Act of 1867, 14 Stat. 517–518, provided:

> That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. * * * And the jurisdiction hereby conferred shall extend * * * to the collection of all the assets of the bankrupt * * *

Section 2 of the Act of 1867, which has no counterpart in the present Act, provided that "the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and

questions arising under this act * * *; and further, that—

> Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity * * * brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee.

The controlling interpretation of Section 1 of the Act of 1867 was given by this Court in *Lathrop* v. *Drake*, 91 U. S. 516. The question there presented was whether under the Bankruptcy Act of 1867 an assignee in bankruptcy "without regard to the citizenship of the parties could maintain a suit for the recovery of assets in a circuit court of the United States in any district other than that in which the decree of bankruptcy was made."

Observing that the jurisdiction granted to the circuit courts in Section 2 was concurrent with the jurisdiction granted in Section 1 of the Act to the district courts (Section 2 makes "such direct reference to the jurisdiction of the District Court"), this Court first analyzed the jurisdiction granted to the district courts by Section 1 of the Bankruptcy Act of 1867. The apparent explanation for the erroneous interpretations given to the *Lathrop* opinion in the *Bardes* case is that the Court did not there specifically name the provision giving jurisdiction to the district courts as "Sec-

tion 1." Instead, it simply discussed the provisions of Section 1 (in sufficient detail as to preclude any possibility that the Court was discussing Section 2 the provisions and language of which are quite different) and took for granted that it would be understood that Section 1 was being referred to. We believe this can be conclusively shown by quoting from the opinion *in extenso*, with some explanatory interpolations of our own in brackets. The court stated at pp. 516–519:

> The jurisdiction of the circuit courts in cases of bankruptcy, as conferred by the act of 1867, was twofold,—original and appellate * * *. But the enacting clauses which confer this jurisdiction [Section 2] make such direct reference to the jurisdiction of the District Court, that it is necessary first to examine the latter jurisdiction. Of this there are two distinct classes: first, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy * * *; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him. The language conferring this jurisdiction of the district courts is very broad and general. [This is obviously the language of Section 1, for Section 2 does not contain any of the language referred to in the following discussion of the Court.] It is, that they shall have original jurisdiction in their respec-

tive districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified [in Section 1]; resulting, however, in the two general classes before mentioned. Were it not for the words, 'in their respective districts' [words appearing only in Section 1], the jurisdiction would extend to matters of bankruptcy arising anywhere, without regard to locality. It is contended that these words confine it to cases arising in the district. But such is not the language. Their jurisdiction is confined to their respective districts, it is true; but it extends to all matters and proceedings in bankruptcy without limit. When the act says that they shall have jurisdiction in their respective districts, it means that the jurisdiction is to be exercised in their respective districts. Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. * * * the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; *and it may be necessary*

for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the act. * * * The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Shearman* v. *Bingham*, 7 Bank. Reg. 490; and *we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy.*

Turning now to the jurisdiction of the circuit courts, we find it enacted in sect. 2 of the act of 1867 * * * Reverting to the language used in the second clause [of Section 2] above cited, it seems to be express and unqualified, that the Circuit Court shall have concurrent jurisdiction with the district courts of the same district. If, therefore, the District Court has jurisdiction of suits brought by an assignee appointed in another district, the Circuit Court of the same district has concurrent jurisdiction therewith. There is no escape from this conclusion * * *.

If jurisdiction was conferred (as we have seen it was) on the various district courts to entertain suits brought by assignees appointed in other districts, there seems to be no reason why the same jurisdiction should

not have been conferred on the various circuit courts, but on the contrary, very cogent reasons why it should have been. Important cases would be very likely to arise, both in amount and in the questions involved, which it would be desirable to bring directly before the Circuit Court, in order, if necessary, that an early adjudication might be had in the court of last resort. [Italics supplied.]

In *Sherman* v. *Bingham*, 3 Cliff. 552, 7 Nat. Bank Reg. 490, Fed. Case No. 12762 (C. C. D. Mass.), cited with approval by this Court in the *Lathrop* and *Schumacher* cases, an assignee in bankruptcy sued in assumpsit in a district other than where the bankruptcy proceedings were pending to recover certain moneys. Mr. Justice Clifford, sitting on circuit, reversed the judgment of the district court which dismissed the action because it thought it lacked jurisdiction. Referring to the Act of 1867, he said (3 Cliff. at 553–554):

> No such limitation, however, is found in the clause of § 1 conferring jurisdiction upon the District Courts as courts of bankruptcy. * * * On the contrary, the same section provides that the jurisdiction * * * of the several district courts, shall extend * * * to the collection of all the assets of the bankrupt; * * *.
>
> Unless the assignee can collect what is due to the bankrupt he can never perform the duty assigned to him as the representative of the bankrupt, and § 1 of the act expressly

> provides that the jurisdiction of the District Courts shall extend to the collection of all the assets of the bankrupt, and to all acts, matters, and things to be done under, and in virtue of the bankruptcy. Nothing of greater importance is required to be done under and in virtue of the bankruptcy than the collection of the assets belonging to the estate of the bankrupt. Bankrupts, as all experience shows, have debts due them in districts other than the one where the proceedings against them are instituted * * *.

Thus it is clear that the *Lathrop* case holds that the general jurisdictional section of the Act (Section 1 of the Act of 1867, now Section 2 of the present Bankruptcy Act) conferred power on all of the district courts to hear cases in their respective districts involving suits brought by an assignee or trustee in bankruptcy.

The Act of 1867 was similarly explained in a very full and lucid decision in *Goodall* v. *Tuttle,* Fed. Case No. 5533 (W. D. Wis.), which was cited with approval and relied upon by this Court in *Babbitt* v. *Dutcher,* 216 U. S. 102, involving the Bankruptcy Act of 1898 and decided ten years after the *Bardes* decisions.[20] In the *Goodall* case

[20] In the *Babbitt* case the Court cited the holding in the *Goodall* case and in two other cases and said: "On the authority of these decisions it must be and is conceded that under the bankruptcy acts of 1841 and 1867 ancillary jurisdiction, both in summary proceedings and in plenary suits, existed in all District Courts within their respective districts * * *." 216 U. S. at 111.

the court stated *inter alia* with reference to the Bankruptcy Act of 1867 (10 Fed. Cas. at 580):

> As I have before said, the right to proceed in the district court by the ordinary and plenary modes of actions at law or in equity, as between party and party, is not expressly conferred in the act, but as stated by Chase, C. J., in Re Alexander [Case No. 160], "This jurisdiction may be well enough held to be included in the general grant of the first section." * * *
>
> The second section does not profess or attempt to confer or regulate the jurisdiction of the district courts. That relates exclusively to the circuit court. But it may with propriety be said to assume the existence of this jurisdiction in the district courts. That section clothes the circuit court with concurrent jurisdiction with the district court in certain (not all) cases arising under the act, but not of the character of this case, so it is not necessary to define or discuss its extent or meaning. *I say by that section, congress assumed the jurisdiction of the district court in all cases, and that it was conferred by section 1, for if it is not found in that it does not exist. And in that assumption there is a very clear legislative construction of the extent and meaning of section 1.*
>
> To be more specific than Chief Justice Chase, I think it may well be held to be included in the express and general power "to the collection of all the assets of the bankrupt" [Section 1]. [Italics supplied.]

In the course of its opinion in *Goodall* v. *Tuttle*, the court stated its conclusion that no satisfactory or plausible reason could be advanced for permitting an assignee in bankruptcy to sue for the collection of the debtor's assets in the district court appointing him, that does not apply, with equal force, in favor of his right to sue in any other district. And, asked the court (p. 581), "if no reason for such distinction can be assigned, why impute to congress an intention to create one?"[21] The court ended by saying (10 Fed. Cas. at 582):

> I have not undertaken to define with accuracy the character or extent of the jurisdiction of the circuit courts under the second section, as I do not see that that section sheds any light upon the jurisdiction of the district courts as conferred by section one.

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[21] "The act further confers the power upon the district courts to collect all the assets of the bankrupt, and to do all other acts necessary to be done in virtue of the bankruptcy. This by implication confers the authority upon the district courts to entertain jurisdiction of suits in the name of the assignee against third persons, either at law or in equity, for the collection of the debts and property of the bankrupt; and as such jurisdiction is not expressly limited to the district courts where the proceedings are pending, and as no reason exists for such limitation, the courts are not warranted in restricting its exercise to such district." *Goodall* v. *Tuttle*, 10 Fed. Cas. at 582.

On the basis of the foregoing we believe it clear that the reference in the opinion in the *Bardes* case to *Lathrop* v. *Drake* was a misinterpretation both of the *Lathrop* case and of the provisions in the Bankruptcy Act of 1867 dealt with in *Lathrop* v. *Drake*, 91 U. S. 516.[22] We refer to that portion of the *Bardes* opinion which states (178 U. S. at 531):

> And the jurisdiction of the District and Circuit Courts over suits to recover assets of the bankrupt from a stranger to the pro-

[22] The *Bardes* case appears to rest, insofar as it discusses the Act of 1867, not upon an independent analysis of that Act but upon a misreading of the opinion in the *Lathrop* case which *did* involve the Act of 1867. In the *Bardes* case a trustee in bankruptcy of the estate of an individual who had gone into voluntary bankruptcy had filed suit in the federal district court in which bankruptcy proceedings had been commenced to set aside an allegedly fraudulent conveyance made by the bankrupt prior to bankruptcy. The defendants did not consent to such a suit and the crucial question was whether Section 23 (b) was applicable to such a suit. If it was, then the district court could not exercise jurisdiction here without consent of the defendants. This certified question, an affirmative answer to which obviated the need for consideration of any other questions (discussion of which could be only *obiter dictum*), was answered by the Court thus:

"The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several District Courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors." (178 U. S. at 539.)

> ceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld [in the *Lathrop* case] not under the provisions of Section 1 of that act [of 1867], giving to the District Court original jurisdiction of proceedings in bankruptcy, and of Section 2, giving to the circuit court supervisory jurisdiction over such proceedings; but wholly under the distinct clause of Section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity * * *.

A comparison of what the Court in the *Bardes* case thought was said in the *Lathrop* case with the actual language in that case makes clear that the *Bardes* opinion erred. We desire to emphasize, however, that this error did not in any way affect the ultimate decision and result in the *Bardes* case because the Court was squarely faced with Section 23, which was there applicable, and unquestionably Section 23 did restrict the jurisdiction of the district courts as the *Bardes* opinion held.[23]

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[23] In Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy* (1935) 20 Iowa L. Rev. 565, 569, the author, in criticizing *Bardes* v. *Hawarden Bank*, emphasizes that the holding of the case "would seem to have given undue weight to Section 23b while failing to give any effect to the grant of jurisdiction under Section 2 (7) in violation of a cardinal principle of statutory interpretation that an exception ought not to be so construed as to wholly destroy

Petitioners also rely upon *Schumacher* v. *Beeler*, 293 U. S. 367. In that case the Court repeated the erroneous interpretation of the jurisdictional provisions of the Act of 1867. The error may be attributed to the Court's complete reliance upon the language in the *Bardes* case which dealt with the Act of 1867 (see 293 U. S. 367 at 371-2). Furthermore, the *Schumacher* case is entirely inapplicable here for, as the Court there stated (293 U. S. at 370-1):

> The case * * * turns on the effect of the sheriff's consent under § 23 (b). The sheriff contends that he had no authority to give the consent; but he was the defendant in the suit and his consent was actually given. We find no ground for concluding that the consent was invalid.

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the grant to which it is attached." Ross further continued (p. 570):

"The court in the *Bardes* case * * * entirely overlooked the force of Section 23 (a). It is likewise significant that the grant of jurisdiction in Section 2 is limited to district courts while the restriction in Section 23 (a) was confined to circuit courts. An interpretation of the Act which would have harmonized its provisions would have been to recognize Section 2 (7) as conferring jurisdiction upon district courts over all suits by the trustee subject only to a venue restriction of Section 23 (b) waivable with consent of the defendant, while Section 23 (a) might have been regarded as intended to limit the extensive jurisdiction employed by the circuit courts under the Bankruptcy Act of 1867 to actions by the trustee which the bankrupt himself could have brought in the circuit court."

Thus, not only did the *Schumacher* opinion fall into an understandable error concerning the Act of 1867 but its discussion thereof was entirely dictum. That case did not involve Chapter X or even Section 77B, and Section 23 was applicable there but not in the present case. Finally, as noted above, these dicta are contrary to the interpretation given to Sections 2 (a) (7) and 23 in a number of other decisions under the 1898 Act.

We submit, therefore, that the legislative and decisional setting, in the light of which Section 2 (a) (7) was incorporated into Section 102, is thoroughly consistent with the determination below that Congress, in making Section 23 inapplicable to Chapter X, intended to expand, rather than narrow, the choice of forum of corporate reorganization trustees. This position is in accord with the remedial purposes of Chapter X and the specific legislative history of the applicable sections of the Act.

The court below found jurisdiction in the district court for the present action within the four corners of the Bankruptcy Act and did not reach the question as to whether such jurisdiction was derivable from Section 24 of the Judicial Code. In view of our position that jurisdiction is conferred by the Bankruptcy Act itself, and because respondents give full treatment to the Judicial Code aspects of the case, we do not discuss the latter question here.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 850.—October Term, 1946.

Harrison Williams, Clifford F. Stone, Sidney J. Weinberg, et al., Petitioners, v. Carl J. Austrian and Robert G. Butcher, as Trustees of Central States Electric Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 16, 1947.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

Section 2 (a) of the Bankruptcy Act [1] confers upon all bankruptcy courts "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . . to . . . (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided . . ." The exception has reference to § 23 (b), which requires that "Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67 and 70 of this Act." [2] Congress, however, in the Chandler Act of 1938

[1] The Chandler Act of 1938, 52 Stat. 840, generally revised the Bankruptcy Act of 1898, 30 Stat. 544, as amended. Section 2 in its original form was substantially as set out in the text except that jurisdiction was conferred "in bankruptcy proceedings," instead of "in proceedings under this Act." The change in language was made in 1938.

[2] Section 23 in full provides as follows: "JURISDICTION OF UNITED STATES AND STATE COURTS.—a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between

declared the inapplicability of § 23 in reorganization proceedings under Chapter X; and it is upon the significance of this action to the jurisdiction of the federal courts that this case turns.[3]

Respondents were appointed trustees for the Central States Electric Corporation, a Virginia Corporation in reorganization in the District Court of the United States for the Eastern District of Virginia. Following an investigation under § 167[4] of the Act, respondents were authorized to institute suit against petitioners, who are past and present officers and directors of the debtor and others having connection therewith. This suit was then

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receivers and trustees as such and adverse claimants, concerning the property acquired or claimed by the receivers or trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the receiver and the trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act."

Section 23 (a), as originally enacted, related to the circuit courts, which were abolished in 1911 by § 289 of the Judicial Code. 36 Stat. 1167. Formal amendment to § 23 (a) was made in 1926. 44 Stat. 664.

[3] Chapter X, containing the reorganization provisions, superseded § 77B. Section 102 of Chapter X provides: "The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors,' and 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this chapter."

[4] The investigation was made pursuant to the decision in *Committee for Holders, etc.* v. *Kent*, 143 F. 2d 684 (1944).

filed against petitioners in the District Court of the United States for the Southern District of New York, alleging a conspiracy to misappropriate corporate assets and asking an accounting and other relief. There was no allegation of diversity and jurisdiction was rested upon "the Constitution of the United States (Article I, Section 8, Clause 4, and Article III, Section 2), the Act of Congress relating to Bankruptcies (U. S. Code Title 11), and . . . the provisions of Section 24 (1), (19) of the Judicial Code . . ."

The District Court dismissed for lack of jurisdiction;[5] but the Circuit Court of Appeals reversed, holding that since the governing provisions of § 23, to which the "except" clause of § 2 (a) (7) refers, were suspended in Chapter X proceedings, jurisdiction to hear this plenary suit could be rested upon the general language of § 2. Other alleged grounds for jurisdiction were not considered. 159 F. 2d 67 (1946).

1. Petitioners construe "proceedings under this Act," within which the jurisdictional grant contained in § 2 is confined, as extending only to matters proper for summary disposition,[6] and interpret the suspension of § 23 in Chapter X cases, without providing a substitute therefore, as removing from the Act an affirmative grant to federal courts of jurisdiction to hear plenary suits, rather than as an action aimed at expanding that jurisdiction.[7] But

[5] Petitioners also based their motion to dismiss on the applicable statute of limitations, but the District Court indicated that if there had been jurisdiction to proceed, the motion to dismiss would otherwise have been denied, because of factual issues which first required determination.

[6] "Proceedings under this chapter," referred to in §§ 101 and 102 of Chapter X, is similarly construed.

[7] According to this view there would, in Chapter X cases, be no provisions in the Bankruptcy Act conferring jurisdiction upon federal courts to hear plenary suits other than in §§ 60, 67, and 70. A reorganization trustee would be left, where he could, to take advantage of the ordinary grounds for federal jurisdiction.

these views rest, in the main, upon what we think is an erroneous appraisal of the history of §§ 2 and 23.

Section 2 is substantially identical with § 1 of the Bankruptcy Act of 1867.[8] *Babbitt* v. *Dutcher*, 216 U. S. 102, 107 (1910); and cases dealing with that Act, while recognizing that certain suits brought by bankruptcy assignees should proceed in plenary, rather than summary, fashion, held that § 1 gave jurisdiction to the bankruptcy courts to proceed in both ways.[9] And although certain aspects of a bankruptcy proceeding could be handled only by the court in which the adjudication was had, § 1 conferred upon all bankuptcy courts jurisdiction to hear plenary suits brought by bankruptcy assignees against adverse claimants or against debtors of the bankrupt.[10]

Lathrop v. *Drake*, 91 U. S. 516 (1875), viewed the jurisdiction of the district courts in this manner and, we think, contrary to the statements later made in *Bardes* v. *Hawarden Bank*, 178 U. S. 524 (1900), and *Schumacher* v. *Beeler*, 293 U. S. 367 (1934), upon which petitioners rely, considered the jurisdiction of the district courts over plenary suits to rest upon § 1 of the 1867 Act.[11]

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[8] 14 Stat. 517. Section 1 gave the bankruptcy courts original jurisdiction "in all matters and proceedings in bankruptcy" which extended "to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt . . ."

[9] *Sherman* v. *Bingham*, 21 Fed. Cas. 1270, No. 12,762 (1872); *Goodall* v. *Tuttle*, 10 Fed. Cas. 579, No. 5,533 (1872). The requirement of plenary proceedings, though not expressly appearing in the Act, was well recognized. *Marshall* v. *Knox*, 16 Wall. 551 (1872); *Smith* v. *Mason*, 14 Wall. 419 (1871).

[10] *Sherman* v. *Bingham*, 21 Fed. Cas. 1270, No. 12,762 (1872); *Goodall* v. *Tuttle*, 10 Fed. Cas. 579, No. 5,533 (1872).

[11] The references to the Act contained in the discussion of the jurisdiction of the district courts obviously referred to § 1; and *Sherman* v. *Bingham*, 21 Fed. Cas. 1270, No. 12,762 (1872), which expressly based upon § 1 the jurisdiction of the district courts to hear plenary suits,

Section 2 of the Bankruptcy Act of 1898 substantially repeated the broad grant of jurisdiction contained in § 1 of the 1867 Act. The bankruptcy courts were given "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy pro-

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was cited with unreserved approval. The pertinent passage in the *Lathrop* case is as follows:

"'The language conferring this jurisdiction of the district courts is very broad and general. It is, that they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. The various branches of this jurisdiction are afterwards specified; resulting, however, in the two general classes before mentioned. . . . Each court within its own district may exercise the powers conferred; but those powers extend to all matters of bankruptcy, without limitation. . . . But the exclusion of other district courts from jurisdiction over these proceedings does not prevent them from exercising jurisdiction in matters growing out of or connected with that identical bankruptcy, so far as it does not trench upon or conflict with the jurisdiction of the court in which the case is pending. Proceedings ancillary to and in aid of the proceedings in bankruptcy may be necessary in other districts where the principal court cannot exercise jurisdiction; and it may be necessary for the assignee to institute suits in other districts for the recovery of assets of the bankrupt. That the courts of such other districts may exercise jurisdiction in such cases would seem to be the necessary result of the general jurisdiction conferred upon them, and is in harmony with the scope and design of the Act. The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise. The question has been quite fully and satisfactorily discussed by a member of this court in the first circuit, in the case of *Shearman* v. *Bingham*, 7 Bank. Reg. 490; and we concur in the opinion there expressed, that the several district courts have jurisdiction of suits brought by assignees appointed by other district courts in cases of bankruptcy." 91 U. S. 516, 517–18.

ceedings . . ." [12] But § 2 (7), while granting to all bankruptcy courts jurisdiction to collect and to hear controversies relating to the estate of the bankrupt, appended the words "except as herein otherwise provided." The exception had reference to § 23,[13] which, in the clause applicable to the district courts, provided that, unless by the consent of the defendant, suits by the bankruptcy trustee should be brought only in the courts where the bankrupt might have brought them if bankruptcy proceedings had not been instituted. In sharp contrast to the broad language of § 2 (7) and to the practice under the 1867 Act,[14] § 23, in the interest of litigants and witnesses, deliberately directed to the state courts most of a bankruptcy trustee's plenary suits.[15]

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[12] Section 2 created the courts of bankruptcy and invested them "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . to . . . (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

[13] *First Nat. Bank* v. *Title and Trust Co.*, 198 U. S. 280, 289 (1905); *Bryan* v. *Bernheimer*, 181 U. S. 189, 194 (1901); *Bardes* v. *Hawarden Bank*, 178 U. S. 524, 535 (1900). Section 23 (b), as originally enacted, provided: "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

[14] "A construction of the statute of 1898 which would deprive the federal courts of jurisdiction of the suits in question [trustee's suit to recover property] would make the act of 1898 unprecedented among bankrupt acts." *In re Hammond*, 98 F. 845, 853 (1899).

[15] When S. 1035, which eventually became the Act of 1898, reached the House, the judiciary committee recommended striking out all after the enacting clause and substituting the committee's own bill. Section 23 of the House version, 31 Cong. Rec. 1781 (1898), survived both debate and conference action and became § 23 of the Act of 1898. In

Some lower federal courts, however, immediately held that § 23 did not apply to suits brought to recover certain transfers of the bankrupt's property and, relying upon § 2, upheld the jurisdiction of federal courts.[16] *Bardes* v. *Hawarden Bank, supra*, checked this trend and gave full scope to the language of § 23. Suits to recover fraudulent transfers, like other plenary suits, were to be tried in the state courts. It was in the *Bardes* case unnecessary to explore the scope of § 2; for whatever the grant of jurisdiction there made, the interpretation given § 23 would have required the result reached. In any event, the construction of § 2, standing alone and without regard for the influence of § 23, as being confined to summary matters rested to a great extent upon a reading of *Lathrop* v. *Drake, supra*, with which, as has been indicated, we cannot agree.

Congressional reaction to the *Bardes* case was almost immediate. Wishing to allow the trustee to resort to federal courts in recovering fraudulent transfers and preferences, Congress in 1903 created exceptions to § 23 in favor

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reviewing the bill preliminary to debate, the chairman of the House judiciary committee explained:

"The jurisdiction of State courts to try controversies between the trustees of bankrupt estates and parties claiming adverse interest is not in any way interfered with.

"Suits by the trustee shall only be brought in the courts where the bankrupt might have brought them except for the misfortune of his bankruptcy, unless by the consent of the proposed defendant.

"Under the last bankruptcy law the litigation incident to the settlement of estates was conducted almost wholly in United States courts. The result was great inconvenience and much expense to a majority of the people interested in such litigation as principals, witnesses, and attorneys. Such will not be the effect under this bill. It is proper that such should not be the case, speaking generally, in behalf of the administration of justice." 31 Cong. Rec. 1785 (1898).

[16] *In re Woodbury*, 98 Fed. 833 (1900); *In re Hammond*, 98 Fed. 845 (1899); *Louisville Trust Co.* v. *Marx*, 98 Fed. 456 (1899).

of suits brought under §§ 60 (b) and 67 (e);[17] and, being doubly cautious, Congress also inserted in §§ 60 (b) and 67 (e) clauses giving any bankruptcy court jurisdiction to hear plenary suits brought under those sections.[18] It was explained at the time by the House judiciary committee that § 2 (7) would probably have been ample basis for the jurisdiction of the bankruptcy courts, and that it was only to remove all doubt that §§ 60 (b) and 67 (e) had also been amended.[19]

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[17] 32 Stat. 798–9.

[18] *Id* at 799–800. Congress likewise amended § 70 (e), but by an oversight the exceptions made to § 23 were not correspondingly extended. The omission was corrected in 1910. 36 Stat. 840. See H. Rep. No. 511, 61st Cong., 2d Sess. 6 (1910).

[19] "Section 9: Under the law of 1867, the Federal and State courts had concurrent jurisdiction of suits to recover property fraudulently or preferentially transferred. *Bardes* v. *Bank of Hawarden* (Ia.), 178 U. S., 524, has so construed section 23 b, of the law as to deny such jurisdiction to the district courts, save with the consent of the proposed defendant. In commercial centers this amounts to a denial of justice, the calendars of the State courts being years behindhand; while, growing out of *Bardes* v. *Bank*, have come decisions which have crippled the administration of the law to a marked degree. (See in re *Ward* (Mass.), 5 Am. B. R., 215; *Mueller* v. *Nugent* (Ky.), 105 Fed., 581; this latter, however, recently reversed by the Supreme Court.) There is a very general demand for a return to the policy of the law of 1867. *Were it not for section 23b, section 2 (7), would probably confer ample jurisdiction on the district courts.* The change in section 23, b, proposed by the bill simply excepts from the operation of it all suits which can, under the specific words of the law, be brought to recover property, and this merely by referring to the three sections under which alone such suits can be brought. *To remove all doubt*, also, sections 13 and 16 of the bill confer concurrent jurisdiction of all such suits on the State courts and the Federal district courts, by adding appropriate words to each of the three sections, section 60 b, section 67 e, and section 70 e." H. Rep. No. 1698, 57th Cong., 1st Sess. 7 (1902). (Italics added.)

Substantially the same explanation was given on the floor of the

Where §§ 60 (b), 67 (e), and 70 (e) were not involved, the *Bardes* rule continued to be applied where plenary proceedings were required, as in cases relating to property adversely held[20] and suits upon choses in action belonging to the bankrupt's estate.[21] Left for summary disposition under § 2 were those proceedings in which the controversy related to property in the possession or constructive possession of the court or to property held by those asserting no truly adverse claim.[22]

From its inception § 23 contained a clause seemingly mitigating the rigors of the jurisdictional requirements imposed. A trustee, "unless by consent of the proposed defendant," could bring suit only in courts where the bankrupt could have sued. Subsequent to the *Bardes* case some lower federal courts held that even with the consent of a defendant, some independent ground for federal juris-

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House by Representative George W. Ray, chairman of the judiciary committee. 35 Cong. Rec. 6941, 6942 (1902).

Representative Ray, we note, was second ranking member of the judiciary committee at the time of the passage of the 1898 Act. It was that committee which drafted §§ 2 and 23 in substantially the form appearing in the 1898 Act. See note 15, *supra*. Representative Ray was also a member of the House conference committee, and it was in conference that the Act of 1898 was finally drafted and the serious differences between the House and Senate were resolved.

[20] *Harris* v. *First Nat. Bank*, 216 U. S. 382 (1910).

[21] *Kelley* v. *Gill*, 245 U. S. 116 (1917); *In re Roman*, 23 F. 2d 556 (1928); *Lynch* v. *Bronson*, 177 F. 605 (1910).

[22] *Whitney* v. *Wenman*, 198 U. S. 539 (1905); *Mueller* v. *Nugent*, 184 U. S. 1 (1902); *Bryan* v. *Bernheimer*, 181 U. S. 189 (1901); *White* v. *Schloerb*, 178 U. S. 542 (1900). "But in no case where it lacked possession, could the bankruptcy court . . . adjudicate in a summary proceeding the validity of a substantial adverse claim. In the absence of possession, there was under the Bankruptcy Act of 1898, as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit." *Taubel, etc., Co.* v. *Fox*, 264 U. S. 426, 433–34 (1924).

diction must be present.[23] The conflict was resolved in *Schumacher* v. *Beeler, supra*. It was held that in § 23 Congress had exercised its bankruptcy powers to confer upon federal courts jurisdiction conditioned upon a defendant's consent [24] and that, given consent, no independent ground for federal jurisdiction was required. The case turned upon the meaning of the consent clause in § 23. The remarks offered concerning § 2 were unnecessary and, in any event, were based upon the similar statements made in *Bardes* v. *Hawarden Bank, supra*.

The *Beeler* decision, like that in the *Bardes* case, does not direct a conclusion that § 2, in the absence of § 23, confers only a summary jurisdiction; for it was because of the limitations of § 23 that plenary suits had been excluded from the otherwise broad scope of § 2.[25] Cases construing

[23] *Matthew* v. *Coppin*, 32 F. 2d 100, 101 (1929); *see Stiefel* v. *14th Street Realty Corp.*, 48 F. 2d 1041, 1043 (1931); *Coyle* v. *Duncan Spangler Coal Co.*, 288 F. 897, 901 (1923); *Piano Co.* v. *First Wisconsin Trust Co.*, 283 F. 904, 906 (1922); *De Friece* v. *Bryant*, 232 F. 233, 236 (1916); *McEldowney* v. *Card*, 193 F. 475, 479 (1911). Contra: *Beeler* v. *Schumacher*, 71 F. 2d 831 (1934); *Toledo Fence Post Co.* v. *Lyons*, 290 F. 637, 645 (1923).

[24] "The Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain such suits and could prescribe the conditions upon which the federal courts should have jurisdiction. . . . Exercising that power, the Congress prescribed in § 23b the condition of consent on the part of the defendant sued by the trustee." *Schumacher* v. *Beeler*, 293 U. S. 367, 374 (1934).

[25] The cases decided under the 1867 Act and referred to in notes 10–11, *supra*, recognized the broad scope of language similar to that of § 2; and cases arising under the 1898 Act and decided before *Bardes* v. *Hawarden Bank*, 178 U. S. 524 (1900), based upon § 2 the jurisdiction of the federal courts to entertain plenary suits to recover property adversely held. See note 16, *supra*.

Later cases have recognized the overriding consequence of § 23. "Section 2, clause 7, confers upon the court of bankruptcy jurisdiction to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, ex-

the latter in the presence of the overriding prohibitions of § 23 are not persuasive in a situation where, for the first time, § 23 has been declared inoperative.

2. To accept petitioner's reading of § 2 would produce consequences affording peculiar explanations for the express elimination of § 23 in Chapter X cases. For one thing, there would be destroyed the consent basis for federal jurisdiction of plenary suits brought by a trustee;[26] and, for another, diversity jurisdiction would depend upon the citizenship of the trustee rather than upon that of the debtor. The latter is a formal change of no obvious value, and the former puts a greater limitation upon the jurisdiction of a Chapter X court than has been placed upon an equity receivership, 77B, or ordinary bankruptcy court, a result in obvious contrast to discernible trends in reorganization law.

The committee reports and Congressional debates do not elaborate upon the decision to eliminate § 23,[27] and the

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cept as herein otherwise provided.' But, § 23-b prohibits the trustee (with exceptions not here applicable) from prosecuting, without the consent of the proposed defendant, a suit in a court other than that in which the bankrupt might have brought it, had bankruptcy not intervened." *Kelley* v. *Gill*, 245 U. S. 116, 119 (1917). "There is plainly a controversy in relation to the estate of a bankrupt, and subdivision 7 of section 2 would confer jurisdiction if it were not for the limiting words, 'except as herein otherwise provided.'" *Lynch* v. *Bronson*, 160 F. 139, 140 (1908). See also *Lowenstein* v. *Reikes*, 54 F. 2d 481, 485 (1931) (dissenting opinion), and the analysis of the interplay of §§ 2 and 23 in Rea, *Federal Jurisdiction in Suits by Trustees in Bankruptcy*, 20 Ill. L. Rev. 565 (1935), which was written after the *Beeler* decision.

[26] *Schumacher* v. *Beeler*, 293 U. S. 367 (1934). See p. 10 and note 24, *supra*. In *Tilton* v. *Model Taxi Corp.*, 112 F. 2d 86 (1940), a 77B case, the jurisdiction of the district court to entertain a plenary suit was based upon consent.

[27] The Senate report said in regard to the committee's suggested amendments to § 102: "The proposed amendment amplifies the provision with reference to applicability so as to leave no doubt that the provisions of Chapters I to VII are alone to be deemed applicable,

hearings reveal only that § 23 was one of several sections which the National Bankruptcy Conference desired to eliminate, and which might be held applicable if not expressly deleted.[28] However, the action occurred in the

except where inconsistent or in conflict with the provisions of the chapter." S. Rep. No. 1916, 75th Cong., 3d Sess. 6 (1938).

The amendments to § 102 were agreed to without comment on the floor of the Senate, and were similarly accepted by the House. 83 Cong. Rec. 8697, 9103, 9107, 9110 (1938).

[28] The recommendation was made by Mr. John Gerdes. See Hearings before Subcommittee of the Committee on the Judiciary, U. S. Senate, on H. R. 8046, 75th Cong., 2d Sess. 77 (1938). Mr. Gerdes did not at this time explain the reasons for the suggested suspension of § 23. He stated as follows:

"Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable. Section 64 of the general bankruptcy act, for example, provides for a fixed priority in the payment of claims. This section deals solely with unsecured claims, only unsecured claims being affected by bankruptcy. To apply it in corporate reorganizations—where secured as well as unsecured claims are dealt with—would cause great confusion. To make it clear that section 64 does not apply, we propose this amendment which expressly provides that 64 shall not be applicable to chapter X. The priorities under chapter X would therefore be those used in equity receiverships. That is the present practice under 77B, which expressly provides that section 64 shall not be applicable. When we adopt the same provision here we merely adopt the practice which is already in existence under section 77B.

"In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt. The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X."

A representative of the Association of the Bar of the City of New York also listed § 23 among those sections which "have no applicability

process of developing a workable reorganization technique and should be viewed in that context. While an equity receivership court had dependent jurisdiction, regardless of diversity or other independent grounds for federal jurisdiction, to hear plenary suits related to the estate of the debtor,[29] under § 77B, which made reorganization of non-railroad corporations a part of the bankruptcy scheme, it was believed in some quarters that § 23 would have its traditional effect upon the jurisdiction of federal courts to hear plenary suits, even though the reorganization court was given the "powers" of an equity receivership court.[30] Other commentators, thinking that § 77B should not provide a less efficient procedure than the equity receivership, considered § 23 inapplicable to 77B cases and regarded the reorganization courts as having jurisdiction to hear plenary suits.[31] The controversy had not been settled when Congressional committees were considering the bill which became the Chandler Act of 1938, and such a background for the suspension of § 23 in Chapter X cases obviously raises no inference of a desire to restrict, rather than to expand, the jurisdiction of the federal courts.

To interpret the elimination of § 23 in Chapter X cases as restricting the access of the trustee to the federal courts would not be in harmony with other provisions contem-

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to a reorganization procedure." *Id.* at 37. And the spokesman for the Philadelphia Court Plan Committee suggested amending § 23 to give ordinary bankruptcy courts more effective powers to deal with fraudulently transferred or concealed assets. *Id.* at 26.

[29] *White* v. *Ewing*, 159 U. S. 36 (1895); see *Riehle* v. *Margolies*, 279 U. S. 218, 223 (1929).

[30] Finletter, Principles of Corporate Reorganization 185–87 (1937).

[31] 2 Gerdes, Corporate Reorganizations 1465 (1936). The courts had not been squarely faced with the problem at the time Congress was considering the 1938 revision of the Bankruptcy Act. *Matter of United Sportswear Co.*, 28 Am. B. R. (N. S.) 456 (1935), had suggested that § 23 was applicable, while the contrary intimation is evident in *Thomas* v. *Winslow*, 11 F. Supp. 839 (1935). See also Note, 49 Harv. L. Rev. 797 (1936).

poraneously written into Chapter X and defining anew the position and functions of the reorganization trustee. The appointment of a disinterested trustee was made mandatory in appropriate cases,[32] his qualifications were prescribed,[33] and upon him were devolved functions aimed at eliminating the abuses of previous reorganization schemes.[34] It was his duty to prepare the reorganization plan,[35] and there were conferred upon him investigative powers and duties [36] which not only contemplated the discovery of wrongs done the debtor by its former management, but also insured the "prosecution of all causes of action" which might "add to the assets of corporations in reorganization." [37] These provisions were "of paramount importance in the revision of § 77B," [38] and are hardly indicative of a Congressional desire to restrict the trustee's choice of a forum in which to litigate plenary suits. On

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[32] § 156. The requirement of a disinterested trustee was one of the major substantive additions which Chapter X made to § 77B. S. Rep. No. 1916, 75th Cong., 1st Sess. 19 (1938).

[33] §§ 156 and 158.

[34] The important defects of 77B reorganizations and the remedy provided in Chapter X are analyzed in S. Rep. No. 2084, 75th Cong., 3d Sess. 1-3 (1938).

[35] §§ 167 (6) and 169.

[36] Section 167 in part provides: "The trustee upon his appointment and qualification—

"(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

"(2) may, if the judge shall so direct, examine the directors and officers of the debtor and other witnesses concerning the foregoing matters or any of them;

"(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate."

[37] S. Rep. No. 1916, 75th Cong., 3d Sess. 29 (1938).

[38] *Ibid.*

the contrary, the conclusion more in accord with the purposes of Chapter X and with the pivotal position in which the trustee was placed [39] is that Congress intended by the elimination of § 23 to establish the jurisdiction of federal courts to hear plenary suits brought by a reorganization trustee, even though diversity or other usual ground for federal jurisdiction is lacking.

The decision of the Circuit Court of Appeals is in entire harmony with the foregoing considerations. The language of § 2, in its ordinary sense and no longer limited by § 23, easily comprehends the present type of suit; and so to hold directly and effectively subserves Congressional desires as revealed in the plain policy of Chapter X and in the express elimination of § 23, which has, since its enactment in 1898, been viewed as a sharp restriction upon the jurisdiction theretofore exercised by bankruptcy courts and as a strong preference for state courts.[40] Since all reorganization courts are the objects of the jurisdiction conferred by § 2,[41] the District Court for the Southern Dis-

[39] "These functions of the trustee appointed in the larger cases are difficult to overemphasize . . . Investors must be afforded a 'focal point' for reorganization." H. Rep. No. 1409, 75th Cong., 1st Sess. 43 (1937).

[40] "The Bankruptcy Act of 1898, in respect to the matters now under consideration, was a radical departure from the act of 1867, in the evident purpose of Congress to limit the jurisdiction of the United States courts in respect to controversies which did not come simply within the jurisdiction of the Federal courts as bankruptcy courts, and to preserve, to a greater extent than the former act, the jurisdiction of the state courts over actions which were not distinctly matters and proceedings in bankruptcy." *Bush* v. *Elliott*, 202 U. S. 477, 479–80. (1906). And see pp. 6 and 7, notes 14–15, *supra*.

[41] Section 1 (10) defines the courts of bankruptcy as follows: "'Courts of bankruptcy' shall include the district courts of the United States and of the Territories and possessions to which this Act is or may hereafter be applicable, and the District Court of the United States for the District of Columbia"; *Babbitt* v. *Dutcher*, 216 U. S. 102 (1910). And see § 2 (a). (20) of the Bankruptcy Act.

trict of New York has jurisdiction to hear the present suit, which is brought by reorganization trustees and which charges misappropriation of the assets of a Chapter X debtor.[42] "This seems to be the only logical conclusion to be derived from the fact that § 23 has no application under Chapter X." [43]

3. Respondents in the alternative argue that the equity receivership powers conferred by § 115 [44] include jurisdiction to hear plenary suits and that all reorganization courts may exercise the jurisdiction so conferred. Peti-

[42] Our conclusion is not changed by the language of § 23 (a), which as drawn in 1898, 30 Stat. 544, 552, was designed to grant a limited jurisdiction to circuit courts over "controversies at law and in equity," as distinguished from "proceedings in bankruptcy," and which seems only to have recognized the rule existing under the 1867 Act that certain bankruptcy matters were the exclusive concern of the bankruptcy court. If "proceedings" as used in § 23 (a) denoted those instances in which summary jurisdiction was proper, to find that "proceedings" in § 2 has no such precise meaning simply exemplifies the variety of ways in which "proceedings" has been employed in the bankruptcy statute. Section 11 (e) authorizes trustees to institute "proceedings in behalf of the estate upon any claim" and refers to "any proceeding, judicial or otherwise." And § 60 (b), 67 (e) and 70 (e) speak of "proceedings" in connection with plenary. In Chapter X itself, §§ 101 and 102 refer to "proceedings under this chapter." This term must extend to plenary suits, for otherwise § 23, which deals only with plenary suits, would not be suspended at all. Significant too is that "bankruptcy proceedings" in § 2 was in 1938 changed to "proceedings under this Act" in order that the jurisdiction granted by § 2 would extend to "proceedings" under the new debtor relief chapters, including Chapter X.

[43] 6 Collier on Bankruptcy 673 (14th ed. 1947).

[44] Section 115 provides: "Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provision of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

tioners would, in any event, confine the effects of § 115 to the reorganization court in which the reorganization petition has been approved. We need not pass on these contentions; for, assuming that § 115 is jurisdictional [45] and that it extends only to the primary court, jurisdiction in the present case may still be rested upon § 2. That section, in the absence of § 23, supports the jurisdiction of all district courts to hear plenary suits brought by a reorganization trustee, a result consistent with the aims of Chapter X and with the elimination of a section which is itself applicable to all district courts. Congress could have carved out of § 23 only a narrow exception in favor of the court in which the reorganization proceedings are pending and thereby left unchanged the jurisdiction of other courts over a trustee's plenary suits. Limited exceptions are familiar in the history of § 23. But Congress went further and eliminated § 23 entirely in Chapter X proceedings. Because of the countrywide ramifications of corporate debtors placed in Chapter X reorganization, it is as usual as not for the trustee to resort to foreign jurisdictions for the disposition of plenary suits. Allowing the primary court to hear these suits will not change

[45] The similar "powers" provision in § 77B has been viewed as non-jurisdictional. *In re Standard Gas & Electric Co.*, 119 F. 2d 958, 962 (1941); see *In re Prima*, 98 F. 2d 952, 958 (1938). These cases were decided after the passage of the Chandler Act and considered § 23 fully applicable in pending 77B proceedings. In *Tilton* v. *Model Taxi Corp.*, 112 F. 2d 86 (1940), § 23 was considered applicable in § 77B proceedings so as to permit jurisdiction of the district court to be based upon a defendant's consent. And see *Thompson* v. *Terminal Shares*, 104 F. 2d 1 (1939), for a treatment of a similar provision contained in § 77. On the other hand, § 115 has been interpreted as jurisdictional. *In re Cuyahoga Finance Co.*, 136 F. 2d 18 (1943); see *Warder* v. *Brady*, 115 F. 2d 89, 93-94 (1940). Other courts have thought the suspension of § 23 in Chapter X cases would give the reorganization court jurisdiction to hear plenary suits. See *Clarke* v. *Fitch*, CCH Bankr. Law Ser. ¶ 53,805 (1942); *Tilton* v. *Model Taxi Corp.*, *supra* at 88.

this situation, if it is true that the process of a reorganization court does not run nationwide in plenary cases.[46] Congressional policy would receive only limited recognition if the suspension of § 23 is interpreted as allowing the trustee access to only the appointing court and as restricting his access to all other district courts.[47]

4. Our holding is, of course, that Congress in 1938 extended the jurisdiction of the reorganization courts beyond that exercised by ordinary bankruptcy courts. Section 2 of the 1898 Act contained the broad language borrowed from § 1 of the Act of 1867. But the exception to § 2 (a) (7) acknowledged the overriding limitations of § 23, which was the embodiment of Congressional policy to exclude from the bankruptcy courts many of the trustee's plenary suits. That same meaningful section was expressly eliminated in 1938 in the process of perfecting a chapter of the Bankruptcy Act dealing with the distinctive and special proceedings in corporate reorganization. *Cf. Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648, 676 (1935). This negation of long-standing policy

[46] It has been so held. *In re Standard Gas and Electric Co.*, 119 F. 2d 658 (1941); *Bovay* v. *H. M. Byllesby & Co.*, 88 F. 2d 990 (1937); *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. 2d 363 (1936); *Clarke* v. *Fitch*, CCH Bankr. Law Ser. ¶ 53,805 (1942).

[47] The Chapter X cases cited in note 45, *supra*, did not reach the question of whether courts other than the primary court would have jurisdiction to hear plenary suits where the latter had jurisdiction of such a suit but could not exercise it because of personal service or venue difficulties. Nor did Mr. Gerdes, who construed the suspension of § 23 as establishing, by way of § 115, the jurisdiction of the reorganization court to hear plenary suits. Gerdes, *Corporate Reorganizations: Changes Effected by Chapter X of the Bankruptcy Act*, 52 Harv. L. Rev. 1, 21 (1938). But it was his opinion even under § 77B, where the applicability of § 23 was left in doubt, that all reorganization courts, not just the domiciliary court, had jurisdiction to hear plenary suits brought by the trustee, even though the usual grounds for federal jurisdiction were lacking. 2 Gerdes, Corporate Reorganizations 1480, 1513–14, 1525–26 (1936).

should be given effect consistent with the aims of Chapter X and should not be hedged by judge-made principles not in accord with those aims. Congress need not document its specific actions in elaborate fashion in order to direct this Court's attention to statutory policy and purpose. The failure to provide appropriate fanfare for the suspension of § 23 in Chapter X cases, and for the consequent expansion of federal jurisdiction, hardly invites our opinion as to the advisability of the action which Congress has taken. Judicial drives to limit the jurisdiction of federal courts should not lead to decision falling short of complete effectuation of statutory scheme. With the limitations of § 23 suspended, § 2 confers jurisdiction upon all reorganization courts to hear plenary suits brought by a Chapter X trustee.

5. Petitioners insist that certain consequences, which they term undesirable, will flow from this decision. It is said, for example, that the state courts will automatically be deprived of jurisdiction to hear a trustee's plenary suits. But whether or not this and other suggested consequences will follow we leave for consideration in cases presenting such issues for decision.

The decision of the Circuit Court of Appeals is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 850.—October Term, 1946.

Harrison Williams, Clifford F. Stone, Sidney J. Weinberg, et al., Petitioners, *v.* Carl J. Austrian and Robert G. Butcher, as Trustees of Central States Electric Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 16, 1947.]

Mr. Justice Frankfurter, whom Mr. Justice Jackson joins, dissenting.

On the surface this appears to be merely a bankruptcy case raising technical questions of federal jurisdiction. But the answers to these questions have far-reaching import. They involve the distribution of judicial power as between United States and State courts, and thus concern federal-state relations generally. More immediately, inasmuch as the allowable scope of the business of the federal courts is in controversy, a proper disposition of the case bears upon the quality of the work of those courts and of this Court in particular.

The Court makes a shift in the distribution of judicial power between State and federal courts which has prevailed for half a century. Such a break with the past is not required by what Congress has written nor by any inference drawn from disclosed Congressional policies. On the contrary, I believe that the result reached is repelled by every consideration relevant to the proper construction of the statutory materials by which the jurisdiction of the federal courts is to be determined.

In 1867 Congress granted jurisdiction to the then lower federal courts over suits on claims owing to one whose estate was administered in bankruptcy, though the claims

were based wholly on local law and were devoid of any federal aspect which would give a federal court jurisdiction were the creditor not in bankruptcy. This was another one of those enactments of the Reconstruction period when the influences toward expansion of federal jurisdiction were at flood-tide. As part of the recession from this Reconstruction tendency Congress, in the Bankruptcy Act of 1898, withdrew from the federal courts suits that rested solely on local law even though they involved claims asserted on behalf of one whose estate was being administered in the bankruptcy court. By a tenuous process of implication the Court now concludes that Congress, through the Chandler Act of 1938, enlarged federal jurisdiction in one aspect of the bankruptcy law, though neither the terms of the legislation, nor its context, nor its legislative history, nor considerations of policy heretofore suggested, call for such construction, while the history and structure of the legislation, its judicial interpretation, regard for congruity in finding meaning, and the larger claims of the federal judicial system, support a different reading of the statute. The large assumptions of the decision are that by indirection and without manifested design Congress reversed its prevailing policy of limiting federal jurisdiction and preserving a proper balance between federal and State courts; that Congress deviated from a principle of our federalism especially respected in recent times, according to which claims arising under State law shall be tried under local trial procedure in the local courts; that Congress has departed from a settled policy of fifty years uniformly applicable in bankruptcy proceedings and which now continues as to all other proceedings in bankruptcy, although this established policy of leaving local claims to the State courts does not at all interfere with those aims for effective reorganization through use of the bankruptcy power which gave rise to Chapter X.

1. The facts in this case are not in dispute. The Central States Electric Corporation filed in the District Court

for the Eastern District of Virginia a voluntary petition for reorganization under Chapter X of the Bankruptcy Act. With the consent of the reorganization court, respondents, as trustees, brought this suit in the District Court for the Southern District of New York on behalf of the Corporation for an accounting and damages against its officers and directors for alleged fraud and mismanagement. The District Court found want of jurisdiction, but was reversed by the Circuit Court of Appeals for the Second Circuit. 159 F. 2d 67. This Court now affirms the Circuit Court of Appeals and holds that a Chapter X trustee may bring this plenary suit *in personam* in a federal district court not the reorganization court, although neither diversity of citizenship nor other ground of federal jurisdiction exists.

No doubt Congress could authorize such a suit. See *Schumacher* v. *Beeler*, 293 U. S. 367, 374. Nor is there any doubt that Congress has not conferred upon the district courts the power to entertain such a suit by an ordinary bankruptcy trustee. Section 23 of the Bankruptcy Act specifically limits plenary jurisdiction to a few enumerated cases (of which this is not one), or where defendant consents. The Court finds, however, that Congress, by making § 23 inapplicable to Chapter X proceedings, opened all the federal courts to plenary suits by a Chapter X trustee. To determine the significance of the inapplicability of § 23 to Chapter X proceedings it is necessary to consider the affiliations between the Bankruptcy Act of 1898 and the Chandler Act. That in turn makes it necessary to examine the Act of 1898 in relation to its predecessor, the Act of 1867. These three enactments—the Bankruptcy Act of 1867, the Bankruptcy Act of 1898, and the Bankruptcy Act of 1938—are an interrelated process of legislation. The role of § 23 cannot be properly assessed merely by a textual reading, or by ascertaining its presence or absence in these three Acts. It must be placed in the context of the history of the Act

of 1867 and of the Act of 1898, and the relation of that history to the aims of the Chandler Act.

2. To understand the full import of the Act of 1867, so far as now relevant, it will bear repetition that it reflected the expansionist trend in federal jurisdiction after the Civil War. Statute after statute gave to the federal courts jurisdiction over cases which had previously been left entirely to State tribunals, and this Court gave a broad construction to such statutes. The Bankruptcy Act of 1867 gave to all district and circuit courts concurrent jurisdiction over suits "by the assignee in bankruptcy against any person claiming an adverse interest" in the estate. Section 2 of the Act of March 2, 1867, 14 Stat. 517, 518. This provision was construed in *Lathrop* v. *Drake*, 91 U. S. 516. Mr. Justice Bradley, with characteristic clarity, distinguished between "jurisdiction as a court of bankruptcy over the proceedings in bankruptcy . . . [and] jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." 91 U. S. at 517. But the terms of the Act were read to confer the latter jurisdiction on the lower federal courts. It is worth noting that Mr. Justice Bradley was a well-known exponent of expansive federal jurisdiction. See, *e. g.*, his dissenting opinion in *Murdock* v. *Memphis*, 20 Wall. 590, 639.

3. The business which this broad construction of the Act of 1867 brought to the federal courts, together with that from other sources, led to the overburdening of their dockets, and inevitably of the dockets of this Court, and gave rise to the various movements for their relief. The history of the federal courts is to a considerable measure a history of the rise and fall of the scope of the jurisdiction given to them by Congress. Not to take account of these underlying factors in the construction of judiciary acts is to leave out the meaning in the interstices of the words

of enactments. The Act of 1898 explicitly reveals the important shift in emphasis that had taken place within thirty years in the distribution between State and federal courts of the judicial power at the disposal of Congress. By 1898 the expansionist trend in federal jurisdiction had receded. The movement was toward a curtailment for an overburdened judiciary. The new Bankruptcy Act also showed the recession.

The Act of 1898 was not an amendment of the Act of 1867. The latter had been repealed by the Act of June 7, 1878, 20 Stat. 99, and for twenty years there was no federal bankruptcy Act. Accordingly, the 1898 Act is not to be read as a modification of an existing system. It established a scheme of bankruptcy administration where there was none. Its framers, of course, drew on history. They borrowed heavily from the Act of 1867. But a comparison of the jurisdictional sections of the 1898 Act with those of its predecessor reveals the great change in the attitude of Congress regarding the withdrawal of essentially local litigation from the State courts.

4. The shift in jurisdictional direction was duly respected when the Act of 1898 first came here for construction. Speaking for a unanimous Court, Mr. Justice Gray pointed out the marked structural differences between the Act of 1898 and that of 1867. The latter granted summary jurisdiction to the district court in § 1; plenary jurisdiction was conferred by § 2 on district and circuit courts concurrently of "suits at law or in equity, between the assignee in bankruptcy and an adverse claimant." The Act of 1898 took over § 1 of the Act of 1867, and discarded § 2. Section 2 of the Act of 1898, derived from § 1 of the 1867 Act, confers only summary jurisdiction. Plenary jurisdiction was not conferred by the Act of 1898 on either the district or circuit courts except to the very limited extent granted by § 23.

Such was the construction of the Act of 1898 made almost contemporaneously with its enactment. *Bardes* v. *First National Bank of Hawarden*, 178 U. S. 524. This construction was reaffirmed thirty-four years later by a unanimous Court, speaking through Mr. Chief Justice Hughes. *Schumacher* v. *Beeler, supra.*

5. This recognition of the drastic difference between the two Acts was not drawn merely from the inert words of the statutes. The words expressed the great differences of outlook, to which reference has been made, in regard to the transfer to the federal courts of what is essentially State litigation. This Court found the accent of the Act of 1867 to be on enforcement through "national tribunals." The matter was put quite plainly by Mr. Justice Bradley. "The State courts may undoubtedly be resorted to in cases of ordinary suits for the possession of property or the collection of debts; and it is not to be presumed that embarrassments would be encountered in those courts in the way of a prompt and fair administration of justice. But a uniform system of bankruptcy, national in its character, ought to be capable of execution in the national tribunals, without dependence upon those of the States in which it is possible that embarrassments might arise." *Lathrop* v. *Drake, supra*, at 518.

The outlook of the Act of 1898 as to proceedings not in bankruptcy "properly so called," *Bardes* v. *First National Bank of Hawarden*, 178 U. S. 524, 533, was precisely the opposite. The emphasis was not on uniform enforcement through "national tribunals." Concern was with "the greater economy and convenience of litigants and witnesses" by leaving the determination of what intrinsically are merely local questions to the "local courts of the State." *Bardes* v. *First National Bank of Hawarden, supra*, at 538. The Court again referred to this purpose of the 1898 Act when it gave full reconsideration

to the legislation in *Schumacher* v. *Beeler, supra,* at 374. Emphasis was placed on the importance of ready accessibility to litigants afforded by local courts as against the inconvenience often entailed in bringing suitors to the federal courts, particularly in Western States. By reference to an earlier decision in which that consideration was treated as a controlling factor, the Court indicated a guiding principle in deciding questions of doubtful jurisdiction. See *Shoshone Mining Company* v. *Rutter,* 177 U. S. 505, 511, 513, cited in *Bardes* v. *First National Bank of Hawarden,* at 538.

6. But we are now told that the *Bardes* and *Schumacher* cases misconstrued the Act of 1898 and its relation to that of 1867. The opinions of Mr. Justice Gray and Mr. Chief Justice Hughes were, according to this view, the products of misreading of judicial history and of a faulty analysis of the Act of 1898.—Indeed, the foundation of the decision of the court below and of the argument at the bar of this Court is the claim that the construction placed upon the jurisdictional Act of 1898 by the *Bardes* and *Schumacher* cases was erroneous and to be rejected without compunction because, after all, merely the expression of erroneous *dicta.* Whether the discussion of the whole structure of an Act in order to find meaning for a particular part more immediately in litigation constitutes *dicta,* in the technical sense, is a nice exercise in legal dialectics. The fact of the matter is that it was rationally relevant to the problem calling for adjudication in the *Bardes* cases to consider comprehensively the relation of the Act of 1898 to that of 1867. The view that was taken had the strength that comes not only from a unanimous Court but one contemporaneous with the legislation under scrutiny. And when the construction so placed upon an Act is reaffirmed thirty-four years later by a Court particularly strong in Justices who had had extensive ex-

perience in commercial law, it seems pretty late in the day to suggest that such weighty constructions by this Court are now to be found wrong.[1] The court below was driven to this drastic undertaking. For if § 2 of the Act of 1898 is the source solely of summary proceedings in bankruptcy, and jurisdiction for plenary suits, to a limited extent, was granted solely by § 23, the elimination of § 23 for purposes of Chapter X cannot serve to put into § 2 a plenary jurisdiction which was never there.

7. To reexamine the ground covered in the *Bardes* and *Schumacher* cases would, as it seems to me, be a work of supererogation. And so I will content myself with some observations pertinent to a proper view of the Act of 1898 as an entirety. The different features of an organic statute are not discrete parts. They cast light upon each other and illumine the whole. The Act of 1898 was read as it was by this Court because it established a comprehensive bankruptcy scheme. Sections 2 and 23 were read in combination, for they drew a sharp line between "proceedings in bankruptcy" and plenary "suits at law or in equity." For fifty years it has been the policy of Congress that a bankruptcy trustee bringing an action like that before us should sue in a State court. (This, of course, includes a federal

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[1] In view of his extensive commercial experience on matters of bankruptcy, any observation by Mr. Justice Brandeis carries great weight. But neither in *Kelley* v. *Gill*, 245 U. S. 116, nor elsewhere, did he state that § 2 of the Bankruptcy Act was a grant of plenary jurisdiction to all the courts and that § 23 merely operated as a curtailment of such grant. What is significant is that when, in *Schumacher* v. *Beeler*, *supra*, upon a full dress consideration of the problem, a contrary analysis was made, Mr. Justice Brandeis joined in it.

In another bankruptcy case, this Court said: "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequences as in the present instance." *Maynard* v. *Elliott*, 283 U. S. 273, 277.

court sitting in the State where there is diversity of citizenship. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64; *Guaranty Trust Company* v. *York*, 326 U. S. 99.) Howsoever any section of the Act of 1898 might have been read had it existed by itself, on a view of the Act as an entirety it was settled that summary proceedings may be brought in any federal court, whereas plenary suits at law and in equity, distinguished as such from proceedings in bankruptcy, can be brought only where they could have been brought between the bankrupt and the opposing party had there been no bankruptcy. Section 2 had an intrinsically limited scope in its setting with § 23. The scope continues so limited and does not automatically expand because § 23 is *pro tanto* eliminated.

This jurisdictional differentiation was not a matter of Congressional whim or judicial technicality. It was easy for this Court to discern that the object of Congress "may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses." *Bardes* v. *First National Bank of Hawarden*, *supra*, at 538; *Schumacher* v. *Beeler*, *supra*, at 374. Congress saw good reason for not infringing on the ordinary jurisdiction of State courts where a suit is not really part of the bankruptcy proceedings. It chose to leave such litigation to the appropriate local practice and local rules concerning jury trial in the local court, and at the same time to relieve thereby an overworked federal judiciary.

8. These important considerations touching the interplay of State and federal courts as well as the effective administration of justice in the federal courts have not lost force with time. Congress has continued to recognize their validity. As to bankruptcy trustees generally, the Act of 1938 continues to require that local suits like the present be brought in local courts. And in preparing

for the Judiciary Committee of the House of Representatives an analysis of a predecessor bill introduced by Mr. Chandler, the National Bankruptcy Conference indicated that the considerations relevant to a proper distribution of business as between State and federal courts which underlay the restrictive policy of the Act of 1898 were more than ever applicable:

> "In *Taubel-Scott-Kitzmiller Co.* v. *Fox*, 264 U. S. 426, Mr. Justice Brandeis declared obiter that Congress had power to confer on a bankruptcy court jurisdiction to adjudicate the rights of trustees to property not in possession of the bankruptcy court, either actually or constructively, but adversely held by a third person; but that Congress had not as yet exercised that power, or conferred such jurisdiction under any of the provisions of the Bankruptcy Act.
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> "The proceedings of Congress prior to the enactment of the Bankruptcy Law of 1898 show that the exercise of that power was deliberately withheld, because of the fear of flooding the federal courts with a large volume of new litigation. That motive is even stronger today [1936] than it was in 1898, and for that reason we do not consider it wise to enlarge the jurisdiction at this time; except as indicated to include receivers and so-called 'debtor proceedings.'" (Analysis of H. R. 12889, 74th Cong., 2d Sess., Committee Print p. 134.)

The indicated exceptions do not touch the jurisdiction here asserted. Yet the Court now concludes that as to Chapter X trustees Congress implied an exception so as to allow the trustee to sue in any federal district court in the country. If this be so, I see no escape from the conclusion that not only have the federal courts jurisdiction but the State courts no longer have it. Consideration of so destructive a consequence ought not to be postponed as though it were not immediately relevant to

the proper construction of the legislation before us. If such suits are "bankruptcy proceedings"[2] within the jurisdictional grant of § 2—for it is necessary to find in some language an explicit grant of jurisdiction, and only § 2 is invoked—how can the bankruptcy aspect of the proceeding evaporate when it comes to "matters and proceedings in bankruptcy" as to which "The jurisdiction vested in the courts of the United States . . . shall be exclusive of the courts of the several States"? Rev. State. § 711. Judicial Code. § 256. 28 U. S. C. § 371. No support can be found for this shifting attribution of meaning to the same concept in the history of proceedings under the Act of 1867. To be sure, it was held under that Act that the State courts were not deprived of jurisdiction of such plenary suits. But that was so for the conclusive reason that the provision making federal jurisdiction exclusive in bankruptcy proceedings came into the law much later than the Act of 1867. Federal exclusiveness as to bankruptcy proceedings formally so-called was brought in by § 711 of the Revised Statutes of 1874. During the few years within which the Bankruptcy Act of 1867 coexisted with the requirement of exclusiveness of jurisdiction in the federal courts, the occasion did not arise for applying the provision excluding the State courts. But this Court was well aware of the problem and carefully put it to one side. See *Claflin* v. *Houseman*, 93 U. S. 130, 133, and *Wilson* v. *Goodrich*, 154 U. S. 640. Intrinsically, that question now presses for decision. If plenary suits are "bankruptcy proceedings" within § 2 of the Act of 1898, as the Court holds, how do they cease to be "proceedings in bankruptcy" as to which the federal courts have jurisdiction "exclusive" of the jurisdiction of the several States?[3] Only a forced disharmony can avoid the griev-

[2] The Act of 1938 substituted "proceedings under this Act."

[3] Note that with regard to the exceptions to § 23 Congress deemed it necessary to confer jurisdiction on the State courts, expressly. See §§ 60 (b), 67 (e), and 70 (e) (3).

ous consequences of a construction equally forced as to the relations between §§ 2 and 23 of the Act of 1898.

9. The Court finds a reversal in the policy of contraction of federal jurisdiction which began with the end of the Reconstruction era, found expression in cases culminating in *Gully* v. *First National Bank*, 299 U. S. 109, and undoubtedly furnished the momentum for the radical reversal of historic policy initiated by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. The Court extends the jurisdiction of the federal courts and, I cannot escape concluding, withdraws it from the State courts. It resolves whatever ambiguity may be found in § 102 of Chapter X by interpolating an exception which effects a break with the past and creates difficulties for the future. One would naturally expect that such an innovation in a matter of vital concern to the scope of federal jurisdiction, with its resulting effect upon the relations between the State and federal courts, would be explicitly stated and not depend for discovery upon intricate exegesis. One would suppose that some indication at least of Congressional awareness of the problem could be found. Diligence of counsel has not unearthed the remotest hint that such shift in jurisdiction was contemplated or that the need for it was asserted. Our own investigation has been equally fruitless. There is nothing in Chapter X, in its terms, its antecedents, its history, its advocacy, that gives the remotest hint of a purpose calling for a different policy for reorganization trustees in this respect from other trustees in bankruptcy, or any intimation that the district courts, other than the particular reorganization court, would play a special rôle as to plenary suits in reorganization proceedings. Nor do the purposes of the Chandler Act bear upon this aspect of jurisdiction. Chapter X provided new facilities for reorganization of bankrupt estates and extended the scope of reorganizations. But it is

hardly relevant to the purpose of easier and more comprehensive methods of reorganization to establish a claim through the federal courts rather than the State courts when the basis of recovery is State law, calling for application of State law and procedure. The Court draws support for its conclusion from the fact that other powers are conferred upon the Chapter X trustee which were not possessed by other bankruptcy trustees. But the powers to which attention is called are all explicitly conferred and are not derived by roundabout inference. And unlike the extension of jurisdiction here claimed, the additional powers conferred on the trustee all bear directly upon the very process of reorganization and the purposes for which Chapter X was designed.

The result has been spun largely out of words in the Act of 1898 by disregarding the controlling facts of its history and its long judicial and practical construction. The other source from which the argument is spun is the provision making § 23 inapplicable to proceedings under Chapter X. As we have seen, our decisions ruled that § 23 was not an exception to § 2 but an emphasis of the limited scope of § 2, together with a grant, of little importance, of consent jurisdiction.* If § 2 did not grant jurisdiction to the district courts over a plenary suit like the one before us, merely eliminating § 23 could add no new head of jurisdiction to § 2. And yet the Court finds that the purpose of making § 23 inapplicable to Chapter X was to throw all the federal courts open to plenary suits in Chapter X proceedings, although, as we have seen, not

* If the provisions rendering § 23 inapplicable to Chapter X proceedings also withdrew jurisdiction by consent, it is not an important matter. In resolving what is at best a jurisdictional ambiguity a result which closes the doors of the federal courts to consenting parties is of minor consequence compared with opening wide the door to a jurisdiction theretofore barred to the federal courts, when Congress manifested no consciousness of such a new grant of jurisdiction.

a clear expression either of such purpose, or an assessment of its consequences, is to be found in all the literature on this subject prior to this litigation. If a perfectly reasonable explanation can be given to the elimination of § 23 from Chapter X proceedings, we ought not lightly to attribute to Congress a radical change affecting the jurisdiction of the federal courts, without even an indirect mention of the need or desirability for such a change in the thousands of pages of legislative hearings, debates, and reports on the various bills leading up to the Chandler Act.

10. There is an adequate explanation for the provision making § 23 inapplicable that amply accounts for it, without using it as a springboard for a wholly unforeseen result out of harmony with established jurisdictional considerations.

The provision to make § 23 inapplicable did not appear in the earlier drafts of Chapter X and was not in the bill as it came from the House. It came into the Act through amendments proposed before the Judiciary Committee of the Senate by the National Bankruptcy Conference through its spokesman, Mr. John Gerdes. His statement is all we have by way of legislative history for the amendment.[5] It will be noted that Mr. Gerdes

[5] See hearings before a subcommittee of the Senate Committee on the Judiciary, on H. R. 8046, 75th Cong., 2d Sess., p. 77:

"Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable. Section 64 of the general bankruptcy act, for example, provides for a fixed priority in the payment of claims. This section deals solely with unsecured claims, only unsecured claims being affected by bankruptcy. To apply it in corporate reorganizations—where secured as well as unse-

intimated nothing regarding the need for extending federal jurisdiction, nothing of the desirability of granting plenary jurisdiction to all federal courts, nothing to the effect that a Chapter X trustee needed such greater freedom, nothing to indicate that the plan of that Chapter required a different rule as to ordinary plenary suits from that which was reaffirmed as to suits by other bankruptcy trustees. Yet the court below seemed to find in his statement warrant for its result. And it sought to reenforce its conclusion by appeal to an article by Mr. Gerdes elucidating the Chandler Act after its passage. Gerdes, Corporate Reorganizations:

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cured claims are dealt with—would cause great confusion. To make it clear that section 64 does not apply, we propose this amendment which expressly provides that 64 shall not be applicable to chapter X. The priorities under chapter X would therefore be those used in equity receiverships. That is the present practice under 77B, which expressly provides that section 64 shall not be applicable. When we adopt the same provision here we merely adopt the practice which is already in existence under section 77B.

"In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt. The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X."

Another amendment, proposed to the Committee by Mr. Heuston, representing the Special Committee on Bankruptcy of the Association of the Bar of the City of New York, would have made inapplicable to Chapter X some thirty sections of the Act, among them § 23. "The proposed amendment excludes from a reorganization procedure all sections now expressly excluded by § 77B, subdivision (k), as well as many additional sections which have no applicability to a reorganization procedure." This statement makes no reference to plenary suits. "The sections excluded by the proposed amendment, include those which would permit ancillary receiverships, the appointment of receivers before the approval of the petition . . . the bankruptcy provisions relating to priorities, etc." Hearings on H. R. 8046, before a subcommittee of the Senate Judiciary Committee, 75th Cong., 2d Sess., p. 37.

Changes Effected by Chapter X of the Reorganization Act, 52 Harv. L. Rev. 1, 21.

The Circuit Court of Appeals, it seems to me, finds in Mr. Gerdes' observations what he did not put into them. Nowhere is there the remotest suggestion that in this roundabout and undisclosed way he sought to throw all litigation by or against a reorganization trustee into federal courts, other than the reorganization court, because the federal courts might be a more convenient forum. He was concerned with various provisions, of which § 23 was one, which either were intrinsically in conflict with the new provisions of Chapter X or might be deemed to be in conflict with them. He used the terms "inconsistent" and "not applicable" interchangeably. He was concerned with removing all limitations in the existing Bankruptcy Act that were inconsistent with provisions in Chapter X, limitations which might impair the new scheme for bankruptcy reorganization. While Mr. Gerdes was not explicit as to possible inconsistency between § 23 and Chapter X, a controversy which had arisen in regard to § 23 prior to the Chandler Act, and with which he was thoroughly familiar, fully explains why Mr. Gerdes deemed it desirable that § 23 be made inapplicable to Chapter X.

The matter in controversy was this. Section 77B (a) granted the reorganization court the power possessed by an equity court with regard to equity receiverships. The question arose whether a 77B trustee could bring a plenary suit in the reorganization court without regard to diversity citizenship, as could an equity receiver in his home court. *White* v. *Ewing*, 159 U. S. 36. That the reorganization court had such jurisdiction and that § 23 was no bar, was Mr. Gerdes' view. But other bankruptcy specialists and some lower federal courts were of opinion that § 23 precluded such suits. Compare 2 Gerdes, Corporate Reorganizations, 1478, with Finletter, Principles of Corporate Reorganization, 186–87; and see *In re Standard Gas and*

Electric Co., 119 F. 2d 658; *Tilton* v. *Model Taxi Corp.*, 112 F. 2d 86; *In re Prima Co.*, 98 F. 2d 952.

To remove doubt as to this effect of § 23, namely its possible limitation upon the power of the reorganization trustee to sue in his home court, is the full purpose and scope of its elimination from Chapter X. It was not to give the reorganization trustee roving authority for plenary suits in all federal courts that § 23 was made inapplicable. It was a desire to remove the danger that § 23 might be deemed to deprive a reorganization trustee of the power which he ought to have in his reorganization court, that was implicit in the short statement of Mr. Gerdes on behalf of the National Bankruptcy Conference. It is this purpose that prevailed and it is this purpose that should be enforced, and not a radical departure upsetting the distribution of jurisdiction between State and federal courts, for which there is not a vestige of a claim by anybody in the history that led up to the legislation. The article of Mr. Gerdes to which the court below refers seems to leave no doubt as to the limited purpose of making § 23 inapplicable. "The bankruptcy provision restricting plenary jurisdiction," he wrote, "has been expressly excluded from application so that the equity receivership jurisdiction over plenary actions which are ancillary to the main proceedings is still available, even though the controversy involves less than $3,000 and even though there is no diversity of citizenship." 52 Harv. L. Rev. 1, 21.[6] Section 23 was eliminated, then, to make clear that

[6] The discussion in bankruptcy literature of the effect of the provision eliminating § 23 is not only meager but ambiguous. Conflicting arguments can be drawn by giving variant meanings to language susceptible of them, but this only serves to indicate that on such tenuous materials ought not to be based a reversal of jurisdictional policy of far-reaching import.

It is worthy of note that Mr. Gerdes in his article cites as the effect of the elimination of § 23 only the clarification of the jurisdiction of the reorganization court itself over plenary suits. He does not note

when in § 115 of the Act of 1938 Congress gave to the reorganization court equity powers like those which had been conferred in § 77B.(a), it authorized the trustee-receiver to bring plenary suits in his home court. Such also is the view of another important witness in the hearings on the Chandler Bill, see Weinstein, The Bankruptcy Law of 1938, pp. 63–64, 193–94. Compare the analysis of the Chandler Act in 11 U. S. C. A. xxx.

This construction gives scope to the provision making § 23 inapplicable in Chapter X proceedings. It is consistent with the policy of the whole Bankruptcy Act, and gives effect to the grant of equity powers to the reorganization court. On the other hand, nothing in the policy of the Chandler Act, in its language, in its history, or in any other factor relevant to its construction, justifies a finding that Congress, by implication and indirection, without comment or discussion, changed the meaning which this Court had given to its legislation for fifty years, and expanded a federal jurisdiction which is already overburdened and which Congress has tended to contract; that it upset the relation between federal and State courts which demands that, even in bankruptcy, claims created by State law be litigated in local courts, applying local law under local rules of procedure and trial practice, "to the greater economy and convenience of litigants and witnesses."

11. This decision overturns the analysis which has guided the Court in construing the distribution of jurisdiction between the federal and State courts which Congress devised by the Bankruptcy Act of 1898, and attributes to the Act of 1938 a big change in this distribution,

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any expansion of the jurisdiction of the other district courts although, under § 77B, when § 23 was not made expressly inapplicable, it had been his view that other district courts would have plenary jurisdiction as ancillary to the receivership jurisdiction of the reorganization court. See 2 Gerdes, Corporate Reorganization, 1480, 1513–14.

although there is not a glimmer of a hint in its entire legislative history that Congress was aware that it was doing so. Important shifts in jurisdiction ought to be the product of something more persuasive than what is made to appear as a fit of Congressional absentmindedness. It ought not to be deemed natural that Congress took from the State courts long-established jurisdiction and transferred it to the federal courts, when there is nothing to indicate that Congress wanted to do so or knew that it was doing it.

When Congress has not, by plain language, extended the jurisdiction of the district courts which are the feeders of the Circuit Courts of Appeals and of this Court, an unexpressed purpose to swell the dockets of the federal judiciary ought not to be attributed to Congress by considering in isolation the desirability of allowing a particular class of litigation to be brought in a federal court. Any advantage of giving jurisdiction to the federal courts must be balanced against the disadvantages of taking away from the State courts causes of action rooted in State law. And in considering the advantages of absorption by the federal courts of jurisdiction theretofore vested in the State courts, it should be our special concern to be mindful that the district courts are part of a single judicial system. Increase in the scope of the business of the district courts inevitably reflects itself in the business of the Circuit Courts of Appeals and of this Court. It is a truism, but vital to keep in mind, that increase in the quantity of the Court's business affects the quality of its work.[7]

[7] If the Court works under too much pressure, because of the excessive volume of its business, the process of study and reflection indispensable for wise judgment is bound to suffer. Before he became its head, but speaking from close acquaintance with the work of the Court, Chief Justice Taft gave warning that if this Court's business "is to increase with the growth of the country, it will be swamped with its burden, the work which it does will, because of haste, not be of the high quality that it ought to have. . . ." Taft,

Where Congress has clearly enlarged the jurisdiction of the district courts, it cannot be withheld no matter what the effect upon the dockets. But where Congress has not manifested its purpose with clarity—more particularly, where such purpose is derived by way of elaborate argumentation—resolution of jurisdictional doubts properly takes into account the strong policy of Congress, expressed through a series of judiciary acts, not to cast burdens upon the federal courts which interfere with the effective discharge of their functions. See, for instance, *American Security and Trust Co.* v. *District of Columbia*, 224 U. S. 491, and *Phillips* v. *United States*, 312 U. S. 246, 250–51. These are considerations that will seem far afield to the issues of this case only if its decision is not related to the workings of the federal judiciary in the light of its history.

Attacks on the Courts and Legal Procedure (1916) 5 Ky. L. J. No. 1, p. 18. As is well known, it was largely through the leadership of Chief Justice Taft that the Judiciary Act of February 13, 1925, 43 Stat. 936, was passed to enable the Court to keep its business within manageable limits by cutting off the flow of litigation at its various sources. The total number of petitions for certiorari is the most significant index of the Court's business. In the 1927 Term, the first Term during which the influence of the Act of 1925 was fully operative, the total number of such petitions was 587. In the 1946 Term, through June 9, 1947, 1,144 such petitions were considered. Since most of the petitions come from the lower federal courts, any enlargement of their jurisdiction is inevitably reflected in attempts to review those courts here. If it be suggested that the volume of business that will flow from the new head of jurisdiction established by this decision is in itself not likely to be very heavy, it is pertinent to say that it is true of the Court's business also that many a mickle makes a muckle.